88-1622

No. _____

Supreme Court, U.S.
FILED
MAR 31 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

RICHARD L. MITCHELL, JR.,

Petitioner,

V.

THE BOARD OF TRUSTEES OF THE LOS ANGELES COMMUNITY COLLEGE DISTRICT, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RICHARD L. MITCHELL, JR.
1282 Redondo Boulevard
Los Angeles, CA 90019
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Petitioner in Propria Persona

113pp

QUESTIONS PRESENTED FOR REVIEW

1. Under California law, whether California public schools, the Los Angeles and California community college districts, their officials and employees, are state entities that possesses Eleventh Amendment immunity from damages, declaratory and injunctive relief, especially when (1) there exists conflict in state and federal laws and (2) when officials are sued in both their individual and official capaciticies for violating clearly established constitutional and statutory rights?

2. Does a Federal court of appeals, in reviewing a district court's Findings of Fact and Conclusions of Law, enunciated under Anderson v. Liberty Lobby, Inc., 447 U.S. 242 (1986) and Anderson v. Bessemer City, 470 U.S. 564 (1985), or other applicable standards, have discretion to

avoid petitioner's evidence of explicit errors cited, when such errors are clear and pivotal to decision reviewed? And, (2) did court of appeals exceed its jurisdiction by making findings on dispositive issues of facts and law where such issues were not addressed by the district court?

3. Was matter of timeliness properly invoked by respondents** and appropriately considered by lower courts where evidence reveals (1) procedural errors committed by EEOC and (2) court of appeals ruled petitioner's retaliation claim barred while pending review by EEOC?

4. Under Int'l Brotherhood of Tms. v U.S. 431 U.S. 324, 361-62 [n50] (1977), whether petitioner* is entitled to a presumption that his denial of employment was based on impermissible consideration, where a pattern of discrimi-

nation had been established? If so, is this evidence sufficient to create (a) a prima facie case of disparate treatment, and (b) prima facie case of disparate impact?

PARTIES TO THIS ACTION ARE:

Petitioner,* Richard L. Mitchell, Jr. - Respondents,** BOARD OF TRUSTEES OF THE LOS ANGELES COMMUNITY COLLEGE DISTRICT; Leslie Koltai, individually and as Chancellor; William Spaeter, individually and as Vice Chancellor, Personnel Services; Virginia F. Mulrooney, individually and as Vice Chancellor, Personnel Services; Kenneth S. Washington, individually and as Vice Chancellor, Educational Services; Catherine Close, individually and as Staff Counsel, California Community Colleges; Ernestine J. Palmer, individually and as Director, Office of Affirmative Action Programs and Services; Walter C. McIntosh, individually and as President, Los Angeles Southwest College; and Rodney L. Patterson, individually and as Director, Office of Affirmative Action Programs and Services.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i-iii
THE PARTIES	iii
TABLE OF AUTHORITIES	ix-xi
OPINIONS BELOW	1-2
JURISDICTION	2-4
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	4-9
STATEMENT OF THE CASE	9-11
A. Summary of Pertinent Facts	9-11
B. Proceedings Below	
REASONS FOR GRANTING WRIT	11-26
A. The Decision Appealed From Directly Conflict With Applicable Decision Of This Court	11-22
B. The Decision Appealed From Directly Conflict With Applicable Decision Of The California Supreme Court	22-24
CONCLUSION	24-26

APPENDICES

PAGE

Unpublished Ninth Circuit's Memorandum decision, affirming district court's grant summary judgment in favor of Respondents, dated August 17, 1988 (decision appealed from) A-1

District court's Findings of Fact and Conclusions of Law, dated September 29, 1987 ..... B-1

Order and Opinion resignated by Ninth Circuit as published upon request by Appellees' attorney, dated November 10, 1988, 88 Daily Journal D.A.R. 14092 ..... C-1

DUE TO THE VOLUMINOSITY OF EVIDENCE APPENDICES D THROUGH W ARE PROVIDED IN A SEPARATE VOLUME

Order by District Court denying Petitioner's motion to remand action to state court, dated September 29, 1986 ..... D-1

Order by Ninth Circuit dismissing Petitioner's appeal of a 60(b) motion for lack of jurisdiction, dated November 21, 1987 ..... E-1

Order by Ninth Circuit denying Petitioner's request to depublish, dated January 3, 1989 F-1

PAGE

Order and Amended Opinion by Ninth Circuit, dated January 11, 1989 ..... G-1

Investigative Findings by OCR, dated, April 14, 1986 ..... H-1

Reporter's transcript of District Court's granting Petitioner's motion for leave to file an amended complaint, dated January 12, 1987 ..... I-1

Reporter's transcript regarding Appellee's Catherine Close motion to dismiss or for summary judgment, dated March 23, 1987 ..... J-1

Reporter's transcript regarding Appellee's Catherine Close motion to set aside the default and denial of summary judgment for all Respondents, dated April 27, 1987 .. K-1

Judgment entered and filed by District Court on September 29, 1987 (Judgment appealed from) L-1

Order by Ninth Circuit denying Petitioner's petition for rehearing and rehearing en banc re Ninth Circuit's ruling that his 60(b) appeal was not a final judgment under § 1291 ..... M-1

PAGE

Order by Ninth Circuit denying Petitioner's petition for rehearing of their unpublished Memorandum decision of 8-17-87, dated October 13, 1988 ..... N-1

Order by this Court granting Petitioner's petition for leave for an extension to file a petition for writ of certiorari, dated February 10, 1989 ..... O-1

Letter from the Clerk's office of this Court returning a copy of Petitioner's petition for writ of certiorari, dated February 14, 1989 ..... P-1

Letter from the Clerk's office of this Court returning Petitioner's petitons for writ of certiorari pursuant to Rules 28.2 and 33 of this Court, dated February 14, 1989 ..... Q-1

Letter from the Clerk's office of this Court notifying Petitioner he had not complied with Rules 28.2 and 33 of this Court, dated March 6, 1989 ..... R-1

Respondents' request that Ninth Circuit publish its August 17, 1987 Memorandum decision, dated September 14, 1988, w/six letters of support S-1

PAGE

Petitioner's request that Ninth Circuit de-publish its November 10, 1988 redesignated Opinion, dated, November 18, 1988 ..... T-1

Inter-office Correspondence from Ms. Deweylene D. Henry, notify-administrative staff of her awareness of a bias interview committee assembled to conduct the interview for position vacancy of Senior Director, Occupational & Technical Education, dated December 2,1983.. U-1

Declaration of Ms. Deweylene D. Henry in support of Petitioner's opposition to Respondents' motion for summary judgment, dated February 17, 1987 ..... V-1

Inter-office Correspondence from Respondents' Affirmative Action Officer notifying Respondents' administrative staff of OCR pending investigation, dated sometimes in September, 1985 .. W-1

TABLE OF AUTHORITIES

CASES

PAGE

Anderson v. Bessemer City, 470 U.S. 564 (1985) i

Anderson v. Liberty Lobby, Inc., 447 U.S. 242 (1986) i

Gonzalez v. State of California, 154 Cal. 716, 728-29 (1908) 23

Jackson v. Hayakawa, 605 F.2d 1121 (9th Cir. 1979) 15

First National Bank v. State of CA. 197 Cal.App.3d 627; __Cal.Rptr. ___(Dec. 1987) 22

Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978) 15,16

Patsy v. Florida Board of Regents, 457 U.S. 496 (1982) 20

Roberts v. College of the Desert, 861 F.2d 1166, 1167 (9th Cir.1988) 20,21

Stones v. Los Angeles Community College District, 796 F.2d 270 (9th Cir. 1986) 13,19

Stones v. Los Angeles Community College District, 572 F.Supp. 1072 1077 (C.D. 1983) 19

Union Trust Co. v. State of California, 154 Cal. 716, 728-729 (1908) 23

CONSTITUTION OF THE UNITED STATES

The Supremacy Clause 4

Fourteenth Amendment 4

Eleventh Amendment 5

STATUTES

18 U.S.C. § 1001 5

28 U.S.C. § 1441(c) 5-6

29 U.S.C. §§ 621-34 6

42 U.S.C. § 1981 6

42 U.S.C. § 1983 6

42 U.S.C. § 1985 7

42 U.S.C. § 2000e et seq..... 7

California Code of Civil Procedure
§ 340(1) 7-8

California Code of Civil Procedure
§ 340(3) 8

California Government Code
§ 12900 et seq..... 8-9

California Government Code
§ 11135 9

OTHER

California Community College Report
on Enrollment, Research and
Analysis Unit. Report No. 88-6,

July, 1988 18-19

California Department of Education
Enrollment Report, (ISBN-0-8011-
0757-1), Sacrament, CA, 1988.... 18-19

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THE BOARD OF TRUSTEES OF THE LOS ANGELES COMMUNITY COLLEGE DISTRICT, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

Petitioner Richard L. Mitchell, Jr., respectfully prays that a writ of certiorari issue to review the unpublished Memorandum decision of the Ninth Circuit court of appeals, affirming the district court's grant of summary judg-

ment in favor of respondents, which is attached hereto as Appendix A-1, entered August 17, 1988; the district court's Findings of Fact and Conclusions of law, whis is shown as Appendix B-1, entered September 29, 1987, and judgment appealed from, also entered on September 29, 1987, attached as Appendix L-1. Order and redesignated opinion entered in the Daily Journal on November 10, 1988, attached as Appendix C-1; order and amended opinion entered January 11, 1989, attached as Appendix G-1.

JURISDICTION

The Memorandum decision of the court of appeals was entered on August 17, 1988. A timely petition for rehearing was filed on August 29, 1988 and denied on October 13, 1988. A timely request to de-publish was filed on September 26, 1988 and a responsive pleading filed on November 7,

1988, and denied on January 3, 1989. The Ninth Circuit entered an additional order and amended opinion on January 11, 1989. A timely petition for leave for an extension to docket his Petition for a writ of certiorari was made by the petitioner on November 29, 1988 to this Court which was granted December 6, 1988, which included to February 10, 1989.

Petitioner timely filed his petition granted by this Court on December 6, 1988. However, those petitions for a writ were returned on February 14, 1989, to the petitioner due to petitioner's failure to comply with Rules 25.2 and 33 of this Court. Petitioner filed a petition for rehearing with this Court, pursuant to Rule 51.1 of this Court. However, it was determined that the petitioner had further failed to comply with Rules 25.2

and 33 of this Court, those briefs, too, were returned to him. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional and Statutory Provisions involved in this case are as follows:

1. Constitution of the United States.

A. The Supremacy Clause, which provides:

> "This Constitution, and laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the land; and the judges in every state shall be bound thereby; anything in the Constitution or Laws of any State to the contrary notwithstanding."

B. Fourteenth Amendment to the United States Constitution:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life,

liberty...without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

C. Eleventh Amendment to the Constitution:

"The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

2. Statutes of the United States.

A. 18 U.S.C. § 1001:

"Whoever, in any matter within the jurisdiction of any department of agency of the United States knowingly and willfully falsifies, conceals or cover up by any trick, scheme, or device a material fact or makes any false, fictious or fraudulent statements or representations, or makes any uses of any false writing or document knowing the same to contain any false, fictious or fraaudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

B. 28 U.S.C. § 1441(c):

"Whenever a separate and independent claim or cause of action, which would be removable if sued alone, is joined with one or more otherwise non-removable claims or causes of action, the entire action may be removed and the district court may determine all issues therein..."

C. 29 U,S.C. §§ 621-34:

"To fail or refuse to hire....any individual or otherwise discriminate against any individual with respect to his compensation, ... or age".

D. 42 U.S.C. § 1981:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts...and to the full and equal benefits of all laws and proceedings for the security of persons and property as is enjoyed by white citizens."

E. 42 U.S.C. § 1983:

"Every person who under color of state of any statute, ordinance, regulation, custom, or usage, of any state...subjects, or causes to be subjected, any citizen of the United States or other person within jurisdiction thereof to

the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

F. 42 U.S.C. § 1985:

"(3) If two or more persons in any State or Territory conspire...for the purpose of depriving, either directly or indirectly, any person ...of the equal protection of the laws, or of equal privileges... under the law...the party so injured or deprived may have an action for the recovery of damages... against any one or more of the conspirators."

G. 42 U.S.C. §.2000e, et seq.:

"2(a) It shall be an unlawful employment practice for an employer:

(1) to fail or refuse to hire... any individual with respect to his compensation, terms, conditions, or privileges of employment, becaause of such individual's race, color, religion, sex, or national origin."

3. California Code of Civil Procedure

A. § 340(1) One year limit - Penalty, Forefeiture to individual,

State Torts, Within one year:

"(1) An action upon a statute for a penalty or forfeiture, when the action is given an individual, or to an individual and the state, except when the statute imposing it imposing it prescribes a different limitation.

(3) An action for libel, slander, assault, battery, false imprisonment, seduction of a person below the age of legal consent, or for injury to or for the death of one caused by the wrongful act or neglect of another, or by a depositer against a bank for the payment of a forged or raised check; or a check that bears a forged or unauthorized endorsement, or against any person who boards or feeds an animal or fowl or who engages in the practice of veterinary medicine as defined in Section 4826 of the Business and Professional Code, for such person's neglect resulting in injury or death to an animal or fowl in the course of boarding or feeding such animal or fowl or in the course of the practice of veterinary medicine on such animal or fowl."

4. California Government Code § 12900 et seq:

A. § 12940. "It shall be an unlawful employment practice, un-

less based upon a bona fide occupational qualification, or except where based upon applicable security regulation established by the United States or the State of California:

(a) for an employer, because of the race...or sex of any person, to refuse to hire or employ the person...or discriminate against in ...term ...or privileges of employment."

B. § 11135. "No person in the State of California shall, on the basis of ethnic identification, religion, age, sex...be unlawfully denied the benefits of, or be unlawfully subjected to discrimination under any program or activity that is funded directly by the state or receives any financial assistance from the state."

STATEMENT OF THE CASE

A. Summary of Pertinent Facts

In its last order and amended opinion, entered January 11, 1989, the Ninth Circuit Court of Appeals summarized the pertinent facts in its decision affirthe district court's grant of summary judgment in favor of Respondents in the

below following statement from that decision:

"Affirming a grant of summary judgment the court held that a college district is a state entity possessing eleventh amendment immunity from 42 U.S. C. §§ 1981, 1983, and 1985 claims for damages and for injunctive relief.

Plaintiff-appellant Richard Mitchell appeals from the district court's grant of summary judgment to the defendants. Mitchell brought a complaint alleging employment discrimination based on age, sex and race against the defendants community college district's decision to hire someone else for the position of Senior Director. The complaint raised claims under 42 U.S.C. §§ 1981, 1983, and 1985; 29 U.S.C. §§ 621-34; 42 U.S.C. §§ 2000e-2000e-17; for declaratory and injunctive relief and pendent state claims.

The district court found that the appellant's 1981, 1983 and 1985 claims, as well as his ADEA and Title VII claims, were barred by the statute of limitations. Alternatively, the court found that the apellant had failed to raise a genuine issue of material fact to support his allegations of discrimination. The court also found that the defendant Los Angeles Community College District and the individual defendants enjoyed eleventh amendment immunity

from damages of injunctive relief. Further, the court held that the plaintiff's state based constitutional and statutory claims were time barred under California. Because Californid state colleges and universities are dependent instrumentalities of the state, the district is a state entity that possesses eleventh amendment immunity from the appellant's section 1981, 1983 and 1985 claims in damages and for injunctive relief.

Likewise, the individual defendants share in the district's eleventh amendment immunity because they were sued in their official capacities." (See Appendix G-1 thru G-5).

REASON FOR GRANTING THE WRIT

A. The Decision Appealed From Directly Conflict With Applicable Decision Of This Court

As shown in its unpublished Memorandum decision (A-13/14) and in its published opinion (C-14), this case was summarily decided on the issue of under California law, whether California public schools, the Los Angeles and California community college districts, their officials and

employees, are state entities that possesses Eleventh Amendment immunity from damages, declarative and injunctive relief? In pursuading the Ninth Circuit to publish its Memorandum decision, Respondents' attorney garnered support of other attorneys actively practicing law throughout the state of California and affirmed the issue at hand by stating:

> "A published opinion by the court would clarify the status of the law with respect to the availabilityof Eleventh Amendment immunuty to California's schools and community college districts. The Memorandum decision is a well reasoned and scholarly analysis of the issue of whether community colleges in California are agencies of the state and thereby entitled to share in the State's immunity from suit under the Eleventh Amendment. This issue is litigated in virtually every civil rights suit filed against school and community college districts in California. This is ambly demonstrated by the enclosed letters in support of publication". (See Appendix S-1 attached).

And in one letter of support, attorney Peter C. Carton of the Schools Legal Service provides some of the following testimony in support of this issue:

> "...Our office represents over 100 California school districts, including six community colleges. The subject Memorandum opinion at long last resolves a fundamental constitutional law question hanging over the heads of our clients, and we would like to see firm establishment of precedent by formal publication.
>
> In 1986, your Court did not reach the question now resolved. In Stones v. LACCD, (1986) 796 F.2d 270, 272, the Court left hanging the question of whether community colleges are California's political subdivisions and thus covered by Eleventh Amendment immunities. As such, your decision clarifies the holding in Monell v. N.Y. City Dept. of Soc. Services, (1978) 436, 98 S.Ct. 2018. This Memorandum resolves and announces an important rule of law, an issue of substantial legal importance." (See Appendix S-5/6 attached).

A similar letter in support provides another compelling reason why this petition for a writ should be granted. That

convincing testimony for publication came from the General Counsel of School and College Legal Services of Sonoma County Office of Education, attorney Robert J. Henry. Attorney Henry provides in part:

> "This office represents 45 public school and college districts in California. In that capacity this office urges your office to seek publication of the Ninth Circuit Court of Ap0eals' decision in Mitchell v. LACCD. The specific conclusion as to 11th amendment immunity arises in nearly all section 1983 cases involving community colleges in California. In fact, I litigated this point for over one year in the Stewart v. Sonoma County Community College District case...Needless to say, the Mitchell decision would have saved both sides a lot of time and our respective clients some substantial fees." (See Appendix S-9 attached).

The above are only three vital reasons why this Court should grant this petition request; other equally compelling testimony in support of convincing the Ninth Circuit Court of Appeals to publish its initial unpublished Memorandum decision

of August 17, 1988, are shown in Appendix S attached hereto. There nonetheless exists direct conflict in the Ninth Circuit ruling on the Eleventh Amendment issue and this Court's holding on the same. In its ruling, the Ninth Circuit held:

> "...the individual defendant share in the district's eleventh amendment immunity because they were sued in their official capacities. Such suits"are in essence, actions against the governmental entity of which the officer is an agent." Hayakawa, 682 F.2d 1350; see Monell v. New York City Dept. of Social Servs. 436 U.S. 658, 690 n.55 (1978)." (See Appendix A-14 attached).

However, in Monell, supra, at 690, nos. 54, this Court held:

> "Our holding today is, of course, limited to local government units which are not considered part of the State for Eleventh Amendment purposes."

The Ninth Circuit issued its decisions and redesignated its unpublished Memorandum decision (A-1) as a published opin-

ion (G-1) on ground that California community colleges are considered state entities for Eleventh Amendment purposes, which flies in the face of this ruling.

The Ninth Circuit in error ruled that "...the individual defendants shaare in the district's eleventh amendment immunity· because they were sued in their official capacities." (A-14). Although, there has never been rasied the question by Respondents' attorney during these proceedings, regarding whether the Respondents were being sued in their official or individual capacities, due to the fact that all of covers of the pleadings clearly show that the Respondents were being sued in their individual and official capacities. (See p. iii). However, this Court ruled in Monell, supra, at 690, n.55, that "...local government can be sued under § 1983" and that "local

governmental officials sued in their official capacities are 'persons' under § 1983 in those cases in which ...a local government would be suable in its own name."

This case presents a serious public interest problem, that was in error and summarily decided that the "Eleventh Amendment Immunity Protects School District from Discrimination Suit." (See Appendix C-1). This case directly adversely affect the lives of over 500,000 officials and employees presently earning a salary from California's 7,125 public schools and its 106 community college districts. 1/

1/ Total Number of Officiala and Employees Working in California's 7,125 public schools and 106 community college districts

California Public Schools' Officials & Employees (Cont'd)

This landmark decision was made in error and where the economic survival of litigants throughout the state of California, seeking to find relief on this critical issue, will certainly find confusion and disappointment in the existing conflict in this Court's ruling and that of the Ninth Circuit ruling. Until the Ninth Circuit's

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1/ (Cont'd)

Total Number of Officials and Employees Work-in California's Public Schools.

Administrators (certificated, fulltime)	16,031
Pupil Personnel Srvs: (Nurses, counls.	15,204
Faculty	189,564
Administrators (classified, fulltime)	114,204
Classified (non-administrative, Prt)	102,208
Total	437,211

Total Number of Community College Officials and Employees

Administrators (certificated, fulltime)	1,624
Administrators (classified, fulltime)	648
Faculty and other employees	61,035
	63,307

Source: "Report on Enrollment", Fall, 1987. California Community Colleges, Report No. 88-6, Research & Analysis Unit. Report No. 88-6, July, 1988. And California (Cont'd)

decision in the instant case, no California court has ever ruled on the Eleventh Amendment immunity issue for California public schools and community colleges. This is noted in Stones v. LACCD, 572 F.Supp. 1072, 1077 (C.D. 1983) regarding the noted silence on the community colleges, wherein it was stated:

> "Neither the state nor the federal courts have ruled on the Eleventh Amendment status of the state's community college system."

On that same issue in the same case the Ninth Circuit remained silence by ruling in Stones v. LACCD, 796 F.2d 270, 272 (9th Cir. 1986):

"...If the District is properly char-

1/ (Source, cont'd from previous page

Department of Education, Sacramento, CA (ISBN-0-8011-0757-1), 1988. There are a total of 4,488,399 students enrolled in California public schools.

> acterized as an arm of the state, Dr. Stones suit to enjoin it would be also barred... However, we need not reach the Eleventh Amendment question on this record...we need not decide the theoritical..and, we note, quite difficult—question whether judgment against the District would violate the Eleventh Amendment." (At 272).

The Eleventh Amendment immunity issue for California community colleges was again evaded in its most recent case in Roberts v. College of the Desert, 861 F.2d 1166, 1167 (9th Cir. 1988), which was decided only 21 days subsequently to the instant case. The Ninth Circuit remained silence again, in that ruling by stating:

> "The central factor in this inquiry is "whether the named defendant has such independent status that a judgment against the defendant would not impact the state treasury." (at 1167)..."We decline this question, believing that it is one for the district court to determine in the first instance, coincident with the development of an appropriate factual record. See Patsy v. Florida Bd. of Regents, 457 U.S. 496, 515 n.19, 102 S.Ct. 2557, 2567 n.19, 102 S.Ct. 2557 n.19, 73 L.Ed.2d 172 (1982).

And, as recent as March 15, 1989, in Roberts, supra, in an Order and Amended Opinion, when it had a clear opportunity to rely in support of the issue of the Eleventh Amendment immunity question the instant case, it again referred the issue back to the district court. The Ninth Circuit, in a revolving door procedure, again, stated:

> "We decline to decide this question believing that it is one for the district court to determine in the first instance, coincident with the development of an appropriate factual re-record." (See 89 Daily Journal D.A.R. 3339, 3341, n.II, Daily Appellate Journal, Thursday, March 16, 1989.

The relevant question appears, why did not the Ninth Circuit rely upon the instant case as guidance to resolve the immunity issue in its ruling in Roberts, supra?

Clearly the jury will remain out on that question; however, only this Court can put to rest the identifiable conflict and

skirting of the issue by the Ninth Circuit and the district courts of this Circuit. The necessity for resolving this conflict is obvious, and only this Court can do that.

B. The Decision Appealed From Directly Conflict With Applicable Decision Of The California Supreme Court

Against evidence which Petitioner provided the Ninth Circuit Court of Appeals, showing that under First National Bank v. State of California, 197 Cal.App.3d 627;___Cal.Rptr.____ (Dec. 1987) was in conflict with their ruling, they rejected this ruling and ordered their Memorandum decision published. In Petitioner's request for the Ninth Circuit to de-publish its Order and Opinion dated November 10, 1988 (C-1), which was denied on January 3, 1989 (F-1), the California Supreme

Court ruled:

> "..the fact that a state agency is created by statue to discharge a duty constitutionally imposed on the state does not transmit the agency into 'the state' nor render the state liable for its acts under a general theory of respondeat superior. (Union Trust Co. v. State of California (1908) 154 Cal. 716, 728-729 [99 P. 183]; Gonzalez v. State of California, supra, at p. 090 [105 Cal.Rptr. 804]). The authority of an agency like a school district is measured by the authority statutorily conferred upon its governing board. A agency may not act on behalf of the state, nor may the state perform a task delegated to the agency, unless statutorily authorized to do so." (At 634)..."The statute clearly is not intended to protect against a district's default on a financing agreement." (At 637). (See Appendix T-1, p. 5)

The Ninth Circuit of Appeals, in a stunning and schocking department from explicit facts and case law, completely ignored the above cited conflict by publishing its Memorandum decision and steadfastly affirming the district court grant of summary judgment in favor

of Respondents. These are critical issues of national concern which can only be resolved by this Court

CONCLUSION

This Petition involves four questions of federal jurisdiction, upon which, for each question, there exist a con/lict in decisions among the Ninth Circuit Court of Appeals. Since this action was summarily disposed of on the Eleventh Amendment immunity question, the Petitioner has singularly addressed that question; however, he has provided evidence showing conflict addressing other issues raised by the Ninth Circuit in their decisions.

As demonstrated in this writ, the conflict is neither subtle nor unknown, but have reached the point where the Ninth Circuit Court of Appeals have become expressly critical of each other's views.

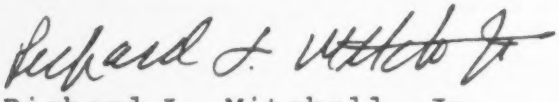
The result of the existing conflict

provides no legal guidance nor direction for those seeking relief regarding the status of public school and community college districts officials and employees concerning Eleventh Amendment immunity availability. The extent and status of this issue remains in choas at this writing. The importance of this issue is best demonstrated by supportive letters of attorneys practicing law for educational institutions throughout the state of California, as shown in Appendix S attached herein.

Given these conflicts, therefore, which goes to the heart of an area as important as federal jurisdiction, and the fact that the conflicts result from a difference in opinion between state and federal law, only this Court can resolve this issue to ensure that the con-

cept of federal jurisdiction will be uniform throughout this circuit. For the above reasons, Petitioner respectfully request that this petition for a writ of certiorari be granted for review.

Respectfully submitted,



Richard L. Mitchell, Jr.

Petitioner in Propria Persona

APPENDIX A-1

FILED AUG 17, 1988
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD L. MITCHELL, JR.,	)C.A. No.
	)87-6553
Plaintiff-Appellant,	)87-6618
	)
vs.	)D.C. No.
	)CV-86-
LOS ANGELES COMMUNITY COLLEGE	)5105 WMB
DISTRICT; LESLIE KOLTAI; VIRGINIA	)
F. MULROONEY; KENNETH S. WASHING-	)MEMORAN-
TON; CATHERINE CLOSE; WALTER C.	)DUM*
MAC INTOSH; RODNEY L. PATTERSON,	)
	)
Defendants-Appellees.	)
	)

Appeal from the United States District Court for the Central District of California William Matthew Byrne, Jr., District Judge, Presiding Submitted on Briefs August 5, 1988** Pasadena, California

Before: KOELSCH, FARRIS, and WIGGINS, Circuit Judges

Richard Mitchell appeals from the district court's grant of summary judgment to the defendants. The appellant brought a com-

plaint alleging employment discrimination based on age, sex and race. The complaint raised claims under 42 U.S.C. §§ 1981, 1983 and 1985; 29 U.S.C. §§ 621-34 (Age Discrimination in Employment Act) (ADEA); 42 U.S.C. §§ 2000e-2000e-17 (Equal Employment Opportunities) (Title VII); for declaratory and injunctive relief and pendent state claims. The district court found that the appellant's 1981, 1983 and 1985 claims, as well as his ADEA and Title VII claims, were barred by the statute of limitations. Alternatively, the court found that the appellant had failed to raise a genuine issue of material fact to support his allegations of discrimination.

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* This disposition is not appropriate for publication and may not be cited to or be the courts of this circuit except as provided by 9th Cir. R. 36-3.

**The panel finds this case appropriate for submission without argument pursuant to Fed. R. App. P. 34(a) and 9th Cir. R. 34-4.

The court also found that the defendant Los Angeles Community College District (district) and the individual defendants, enjoyed eleventh amendment immunity from damages or injunctive relief. Further, the court held that the plaintiff's state based constitutional and statutory claims were time barred under California law. We AFFIRM.

FACTS

The appellant, a 56 year old black male, was a teacher in various capacities in Los Angeles public schools and at various community colleges in appellee's community college district. In October, 1981, Mitchell filed applications with the district for the positions of assistant dean and dean. The district maintained a "pool" of eligible candidates for these positions at the various Los Angeles community colleges. Members of the pool were

eligible for these positions as they became open. Pool members did not have to reapply for these positions as they became available. In 1983, the appellant also applied for the position of Senior Director of Occupational and Technical Education with the district. This position was specially advertised and was not filled from a pool.

None of the application materials used by the district revealed an applicant's race to those making hiring decisions. Since 1983, these materials also do not reveal an applicant's age. Mitchell became eligible for variots asistant dean and dean positions but was never offered a position. He was not recommended for hire after he filed a discrimination claim against the district, but tte defendant responsible for not recommeoding him was unaware of his action. Only four

applicants were reviewed for the Senior Director position. An internal policy required that five people be interviewed for the position by a selection committee; but, instead of readvertising the position, the district interviewed all of the applicants including Mitchell. All members of the selection committee rated him as below average in "knowledge of the area of the position" and quali- and amount of relevant experience. The committee rated the successful candidate a white woman, as "far above average" in these and all other categories of evaluation.

PROCEEDINGS

Early in 1984, the appellant filed a complaint against the district with the U.S. Department of Education Office for Civil Rights (OCR) alleging discrimination on the basis race, sex and age in

the district's Senior Director decision. Because the complaint alleged employment discrimination, the filing with he OCR was deemed to be simultaneous filing with the Equal Employment Commission (EEOC). During the same time period, Mitchell also pursued internal remedies with the district as well as filing a charge with the State Department of Fair Employment and Housing (DFEH). The DFEH informed Mitchell that, pursuant to an agreement between the EEOC and the DFEH, it would defer its investigation to the EEOC. The EEOC, in turn, deferred its investigation to the OCR.[1/] On November 7, 1984, the

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[1] On June 17, 1985, the appellant filed another complaint with the EEOC alleging that he was rejected for the assistant dean and dean positions in retaliation for his previous complaints. This charge is still pending before EEOC. The DFEH again has deferred investigation to the EEOC and informed the appellant on July 17, 1985, the (sic) he had one year from that date to file a private civil suit in state court.

OCR issued its findings and determination. It concluded that Mitchell was not selected because he lacked the necessary qualifications for the Senior Director position and not because of his race, sex or age. The OCR also found insufficient statistical evidence to conclude that there was a pattern and practice of discrimination on the basis of sex, race or age in the district's hiring for administrative positions. On March 15, 1985, the EEOC issued a "Right to Sue" notice to Mitchell. He received it on March 19, 1985.

On July 17, 1986, Mitchell filed this action in state court. Apparently, all of the defendants except for appellee Catherine Close were properly served. The defendants removed the case to federal court. On March 19, 1987, a de-

fault was entered against Close. On April 27, 1987, the district court found good cause to set aside the default because Close was never properly served. On February 9, 1987, all defendants moved for summary judgment.

On September 30, 1987, the court granted summary judgment to all defendants on all claims. The district court found that the defendants did not discriminate against the plaintiff on the basis of race, age or sex, nor did they deprive him of due process. Relying on Wilson v. Garcia, 471 U.S. 261, 280 (1985) the court determined that a one year statute of limitations applied to Mitchell's 42 U.S.C. §§ 1981, 1983 and 1985 claims. Thus, any claims arising before July 17, 1985, were time barred. The court found these to include all claims relating to the

district's hiring decisions regarding the Senior Director position, the retaliation claims, and the claims that the district failed to properly investigate Mitchell's internal claim. The court also found that the plaintiff's ADEA and Title VII claims were barred because he failed to bring this action within 90 days of the EEOC's "Right to Sue" notice. Alternatively, the court found that the appellant had failed to make out a prima facie Title VII employment discrimination claim under McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973), because the undisputed evidence showed that Mitchell was not qualified for the Senior Director position. The court also found no evidence of discrimination on the basis of age. As to the assistant dean and dean positions, the court

found no evidence that the appellant was not hired in retaliation for filing his various complaints because the person responsible for the hiring decision was unaware of them.

The court also found that the district was an agency of the state and thus enjoyed eleventh amendment immunity from Mitchell's suit in damages and his request for injunctive relief. The court further found that all the facts alleged in the plaintiff's complaint related to actions by the individual defendants in their official capacities, acting within the course and scope of their employment. Therefore, the court found that they shared the district's eleventh amendment immunity. Alternatively, as employees performing discretionary functions, the court found these defendants to possess a qualified good faith immun-

ity from the appellant's suit based on Harlow v. Fitzgerald, 457 U.S. 800, 817-19 (1982). The court held that all the plaintiff's state claims were time barred under California law. The court awarded no attorney fees to the defendants. The appellant timely appealed. We have jurisdiction under 28 U.S.C. § 1291.

DISCUSSION

A grant of summary judgment is reviewed de novo. Darrington v. Kincheloe, 783 F.2d 874, 876 (9th Cir. 1986).

I. Eleventh Amendment Immunity.

Under the eleventh amendment, agencies of the state are immune from private damage actions or suits for injunctive relief brought in federal court. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 100 (1984) (eleventh amendment proscribes suit against state agen-

cies "regardless of the nature of the relief sought"); Alabama v. Pugh, 438 U.S. 781 (1978)(per curiam). To determine whether a governmental agency is an arm of the state, the following factors must be examined: whether a money judgment would be satisfied out of state funds, whether the entity performs central governmental functions, whether the entity may sue or be sued, whether the entity has the power to take property in its own name or only the name of the state, and the corporate status of the entity. Jackson v. Hayakawa, 682 F.2d 1344, 1350 (9th Cir. 1982). To determine these factors, the court looks to the way state law treats the entity. Mount Healthy City School Dist. Bd. of Educ. Doyle, 429 U.S. 274, 280 (1977); Ruthledge v. Arizona Bd. of Regents, 660 F.2d 1345, 1349 (9th Cir. 1981), aff'd

sub nom. Kush v. Rutledge, 460 U.S. 719 (1983). California cases demonstrate that California state colleges and universities are "dependent instrumentalities of the state." Hayakawa, 682 F.2d at 1350 (citing Slivkoff v. California State Univ. and Colleges, 69 Cal. App. 3d 394, 400, 137 Cal. Rptr. 920, 924 (1977)(California state universities and colleges are subject to fulllegislative control") and Poschman v. Dumke, 31 Cal. App. 3d 932, 942, 107 Cal. Rptr. 596, 603 (1973) ("The Trustees of California State Colleges are a state agency created by the Legislature")). As the district court noted, the district budget is made up of funds received from the state's general fund pursuant to a state calculated formula. In addition, some fees charged by the district's colleges go to the state. We hold that, under California law, the

district is a state entity that possesses eleventh amendment immunity from the appellant's section 1981, 1983 and 1985 claims in damage and for injunctive relief. Likewise, the individual defendants share in the district's eleventh amendment immunity because they were sued in their official capacities. Such suits "are, in essence, actions against the governmental entity of which the officer is an agent." Hayakawa, 682 F.2d 1350; see Monell v. New York City Dept. of Social Servs., 436 U.S. 658, 690 n.55 (1978).

42 U.S.C. § 2000e-5(f)(1) Civil Action by Commission, Attorney General, or person aggrieved) requires that an aggrieved party bring suit in court within 90 days of receipt of a "Right to Sue" notice. The 90 day requirement is mandatory and jurisdictional. Wong v. Bon Marche, 508 F.2d 1249, 1251 (9th Cir. 1975)(per

curiam). The appellant filed this suit raising these claims one year and five months after receipt of his "Right to Sue" notice, well after the 90 day period. We hold that the appellant is thus barred from raising his ADEA and Title VII claims.

III. State claims.

Cal. Civ. Proc. Code § 340(1)(West Supp. 1988) and Cal. Gov. Code § 12960 (Procedure for prevention and elimination of unlawful employment practices)(West 1980) both require that actions challenging such allegedly unlawful employment practices be brought within one year of the practice complained of. The last actions at issue by the district occurred in 1983 or 1984. The appellant brought this action in July of 1986. We hold that the appellant's state claims are thus time barred.

IV. Default.

The district court set aside the clerk of court's entry of default against appellee Close. A district court's decision to enter or set aside a default is reviewed for an abuse of discretion. Aldabe v. Aldabe, 616 F.2d 1089, 1092 (9th Cir. 1980). The court found that Close had never been properly served by the appellant. Apparently, the appellant assumed that service on the district was sufficient to serve Close. Close, however, is not an employee of the district. Rather, she is a state employee who works for the state community college board in Sacramento. Also, Close was not represented by the same counsel as were the rest of the defendants. It was not an abuse of discretion to set aside the default on these grounds.

V. Attorneys' Fees--Cross Appeal.

The defendants moved for an award of attorneys' fees under 42 U.S.C. § 1988. The district court denied the appellant's (sic) application for attorneys' fees. Attorneys' fees decisions under section 1988 are reviewed for an abuse of discretion. Hensley v. Eckerhart, 461 U.S. 424, 437 (1983); Hardin v. White Mountain Apache Tribe, 779 F.2d 476, 480 (9th Cir. 1985). In a civil rights case, fees may be awarded against an unsuccessful plaintiff only if his action is "meritless in the sense that it is groundless or without foundation." Hughes v. Rowe, 449 U.S. 5, 14 (1980); Dooley v. Reiss, 736 F.2d 1392, 1396 (9th Cir.), cert. denied, 469 U.S. 1038 (1984). The appellees heatedly assert that Mitchell's cause of action is meritless and he brought it for vexatious purposes. Their contention is

cast more as a quest for sanctions under Fed. R. Civ. P. 11 than a request for attorneys' fees under section 1988. Only under exceptional cases should defendants be awarded attorneys' fees in civil rights cases. See Mitchell v. Los Angeles County Superintendent of Schools, 805 F.2d 844, 848 (9th Cir. 1986), cert. denied, 108 S. Ct. 168 (1987)(same plaintiff). Though Dr. Mitchell ultimately did not prevail in his case, we hold that the district did not abuse its discretion by denying the defendants attorneys' fees

CONCLUSION

For the reasons stated above we AFFIRM.

FILED SEP 30 1987
CLERK U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY
DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RICHARD L. MITCHELL, JR., Plaintiff, v. THE BOARD OF TRUSTEES OF THE LOS ANGELES COMMUNITY COLLEGE DISTRICT, et al., Defendants.	CV 86-5105-WMB FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff's Complaint in this action is somewhat confusing as to the claims he makes and the basis for those claims. However, in general, plaintiff contends that he was the victim of race and age discrimination by defendants with re-

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

ference to his failure to be appointed to the positions of Senior Director of Occupational and Technical Education; Assistant Dean of Academic Affairs; and Assistant Dean of Occupation Education, at Los Angeles Southwest College. Plaintiff contends that he was denied due process by the defendants in their handling of his discrimination complaint. He also asserts that he was not invited for interviews for other positions because of his race and age.

Defendants have filed or joined in, motions to dismiss or, in the alternative, for summary judgment. The parties have presented documentation and declarations. The Court treats the motions as ones for summary judgment and makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The Los Angeles Community College District is a California community college district operating pursuant to the laws of the State of California.

2. The Board of Trustees of the Los Angeles Community College District is a seven-member board elected by the residents of the District.

3. Dr. Leslie Koltai is the Chief Executive Officer of the District and is emplooyed by the District as its Chancellor.

4. Mr. William Spaeter was, prior to his retirement, the Vice Chancellor of the Personnel Services Division.

5. Dr. Virginia F. Mulrooney is employed by the District as Vice Chancellor of the Human Services Division.

6. Dr. Kenneth Washington was, prior to his retirement, employed by the Dis-

trict as Vice Chancellor for Educational Services.

7. Dr. Walter C. McIntosh is currently employed as the District's Senior Director of Occupational and Technical Education. Prior to his current assignment, Dr. McIntosh was President of Los Angeles Southwest College.

8. Ms. Ernestine J. Palmer was formerly employed by the District as Director, Office of Affirmative Action Programs and Services.

9. Mr. Rodney L. Patterson is currently employed as the Director, Office of Affirmative Action Programs and Services.

10. Mr. Thomas Fallo is the Vice Chancellor of Business Services for the District.

11. Mr. Richard Anderson is the Senior Director of the Personnel Operations

Branch. He has served in that Capacity since 1967. He reports directly to Dr. Mulrooney, who in turn, reports directly to the Chancellor, Dr. Koltai.

12. Mr. Anderson'a responsibilities include supervision of the District's hiring processes, including the procedures followed in hiring certificated administrators. Under his supervision, the staff opens, updates and maintains the files of applicants and the records relating to particular position vacancies.

13. The selection process for certificated administrators is generally controlled by Personnel Guide B 456. B 456 was issued on June 3, 1981 and reissued again, with amendments, on December 7, 1983 and January 29, 1986.

14. Effective July 1, 1983, the District's Board of Trustees reorganized

and renamed certificated administrative positions, as part of a plan to reduce the number of administrators in the District. Under the reorganization, administrators in the position of coordinator had their title changed to assistant dean. Assistant deans became deans, and decans became vice presidents. The labels on the files in the coordinator pool were simply changed to assistant dean.

15. Prior to December 7, 1983, the Personnel Operations branch accepted and renewed applications on a continuous basis for vice president, dean, and assistant dean. After December 7, 1983, only applications for assistant dean and dean were accepted on a continuous basis. Vice president and director openings were filled from pools created after particular job announcements.

16. The pool of applications for the assistant dean classification currently includes approximately 150 candidates, including Dr. Mitchell. The pool of applications for the dean classification includes about 110 candidates, including Dr. Mitchell.

17. None of the documents utilized by the District in any of its selection procedures requires an applicant to reveal his or her race, or, since 1983 his or her age.

18. Dr. Mitchell first filed an application for assistant dean/coordinator on October 23, 1981.

19. On October 29, 1981, Dr. (sic) Anderson's office sent evaluations forms to each of the references listed on Dr. Mitchell's application. However, only three of Dr. Mitchell's references returned the forms. Dr. Mit-

chell'(sic) then current or most recent supervisors did not return their evaluations.

20. In May, 1983, Mr. Anderson's office, as it regularly does, sent Dr. Mitchell notice that his assistant dean /coordinator application would expire on June 30, 1983 unless he completed the enclosed renewal application. The District's record of having sent this notice to Dr. Mitchell is made in the "For office use only" column of District form C699-4.

21. On August 12, 1983, the District received Dr. Mitchell's first renewal application for the assistant dean classification. Effective July 1, 1983, the District no longer maintained an eligibility pool for the position of coordinator.

22. Dr. Mitchell's renewal applica-

tion would expire June 30, 1984, if not renewed.

23. Mr. Anderson's office sent Dr. Mitchell notice of expiration and a renewal application in June, 1984. No renewal application was received from Dr. Mitchell until November 7, 1986.

24. Dr. Mitchell's failure to renew his application with Mr. Anderson's office resulted in his name not being included in the assistant dean pool for a time, thereby precluding consideration of Dr. Mitchell for any assistant dean openings occurring between June, 1984 and November, 1986.

25. Dr. Mitchell completed his initial application for Dean on October 22, 1981.

26. On October 29, 1981, Mr. Anderson's office sent evaluations to Dr. Mitchell's references. Only three

were returned. Dr. Mitchell's immediate past supervisors did not return evaluations on him. Three evaluations were returned. If any fewer had been returned, Dr. Mitchell would have been rejected from the peel.

27. In May, 1983, a renewal notice for Dean position was sent to Dr. Mitchell.

28. On August 12, 1983, Mr. Anderson's office received Dr. Mitchell's renewal application.

29. In June, 1984, Mr. Anderson's office seant a renewal notice for the position of Dean to Dr. Mitchell.

30. No renewal application was received from Dr. Mitchell until September 19, 1986.

31. In response to a District job announcement, Dr. Mitchell submitted his application for the position of

Senior Director of Occupational and Technical Education. On August 17, 1983 Mr. Anderson's office sent evaluation forms to all of Dr. Mitchell's listed references. All five responded.

32. Only four applications were received for the Senior Director of Occupational and Technical Education position. Dr. Thor and Ms. Marilyn Brock, both white females, were two of the candidates. Personnel Guide B456 requires that five people be interviewed.

33. Rather than rejecting all applications and readvertising the position, the District determined that all of the applicants would be interviewed.

34. If the position had been readvertised and if two more applications had been received, it is likely that Dr. Mitchell would not have been invited to an interview, given the poor evaluations

given by his references and his lack of relevant experience.

35. Dr. Washington, as the responsible Vice Chancellor and immediate supervisor of the Senior Director of Occupational and Technical Education, selected an interview committee. The committee consisted of Dr. Washington, Mr. Lowell J. Erickson, Mr. John McDowell, Ms. Stanley Viltz and Mr. Ted Scheer. Each committee was familiar with the District's programs in occupational and technical education, as well as the duties and responsibilities of the senior director position.

36. Each member of the selection committee is required to sign a document called "Campus Interview Committee-Members Agreement." That agreement requires each member to make his or her evaluation on the basis of the appli-

cant's ability to perform the duties and not on the basis of race, sex, or age. Each member of the committee signed this agreement.

37. Each of the applicants was interviewed by the committee on December 2, 1983.

38. Each committee member is required to complete an evaluation for each candidate interviewed.

39. Each of the committee members evaluated Dr. Mitchell as below average in the category of "Knowledge in the area of the area of the position." The evaluation completed by Stanley Viltz shows that Dr. Mitchell was not aware that the Job Training Partnership Act (JTPA) had replaced the Comprehensive Employment and Training Act (CETA). The job announcement clearly states that the successful candidate would develop and ad-

minister programs under JTPA.

40. The successful candidate, Dr. Thor, was rated "Far Above Average" in her "Knowledge in the area of position" by each member of the committee.

41. Each of the committee members evaluated Dr. Mitchell as below average in quality and amount of appropriate experience.

42. Dr. Thor was uniformly rated as "Far Above Average" in the quality and amount of appropriate experience" category.

43. Dr. Mitchell's strongest evaluation was received in the category of "Grooming and appropriate dress," where all of the committee members rated Dr. Mitchell as average or above.

44. Dr. Thor and Ms. Brock were eventually recommended to the Chancellor by the committee. Dr. Thor was recom-

mended to the Board of Trustees by the Chancellor, Dr. Koltai, and the Board appointed Dr. Thor on December 14, 1983.

45. On or about December 22, 1983, Dr. Mitchell was informed that Dr. Thor had been appointed to the position of Senior Director of Occupational and Technical Education.

46. In June, 1984, the Los Angeles Southwest College sought to fill the position of Assistant Dean, Academic Affairs. Dr. Mitchell was interviewed for the position on June 11, 1984. Dr. Mitchell was not among the top two candidates recommended by the college President, Dr. McIntosh, to the Chancellor.

47. When Dr. McIntosh referred the two highest rated candidates to the Chancellor, he had no knowledge that Dr. Mitchell had filed any employment discrimination claims against the Dis-

trict.

48. The Chancellor did not recommend either of the two finalists to the Board and, as a result, all of the candidates were rejected. Of the two finalists who were rejected, one was a black male and the other was a white male.

49. After deciding not to fill the Assistant Dean of Academic Affairs position, the duties of that position were redistributed and a new position was created -- Assistant Dean of Occupational Education

50. In October, 1984, Los Angeles Southwest College sought to fill the position of Assistant Dean of Occupational Education. Mr. Anderson's office had not received a renewal application from Dr. Mitchell for the assistant dean's pool and, as a result, Dr. Mitchell could not be considered for the position.

51. Mr. Patterson's office is responsible for the investigation of complaints alleging discrimination. He is also the affirmative action officer for the district.

52. On February 15, 1984, Mr. Patterson was informed by the United States Department of Education's Office for Civil Rights (OCR), that Dr. Mitchell had filed a complaint against the District alleging discrimination on the basis of race, color national origin and sex. The complaint was subsequently amended to include age discrimination.

53. Since the allegation in the complaint filed with OCR involved employment discrimination, the filing with OCR was deemed filing with the Equal Employment Opportunity Commission(EEOC).

54. On March 1, 1984, Mr. Patterson

received a letter from the California Department of Fair Employment and Housing (DFEH) dated February 28, 1984. This letter indicated that the DFEH was going to defer its investigation to the EEOC. This was pursuant to the work-sharing agreement between EEOC and the DFEH. In turn, the EEOC deferred its investigation to the OCR. Attached to the DFEH's February 28, 1984 letter was a copy of Dr. Mitchell's OCR complaint bearing the EEOC charge number 092843-217 and alleging age and race discrimination. The copy of the OCR charge also had a date stamp indicating receipt of the complaint by the DFEH on February 23, 1984.

55. On November 7, 1984, Mr. Patterson received the OCR's determination in Dr. Mitchell's age and race case. At page three of the "State of Findings,"

the OCR concluded that Dr. Mitchell was not selected for the position of Senior Director of Occupational and Technical Education, because of his lack of qualifications and not because of his race or sex. Further, at page four of the Findings, OCR found insufficient statistical evidence to suggest that there was a pattern and practice of discrimination on the basis of sex or race in the filling of administrative positions at the District office.

56. Ms. Deweylene Henry filed a discrimination complaint with the Office of Civil Rights relating to the 1983 hiring of Dr. Thor as the Senior Director of Occupational and Technical Education. Dr. Mitchell and Ms. Henry were both candidates for that position. The OCR found in Ms. Henry's case, as it did in Dr. Mitchell's, that there

was no discrimination on the basis of race or sex.

57. At the same time that Mr. Patterson was assisting the OCR in its investigation of Dr. Mitchell's complaint, he was also handling Dr. Mitchell's internal AB 803 complaint relating to the same allegations. The federal complaint took precedence in order to avoid duplication of effort and inconsistent findings. State regulations authorize deferral to outside employment discrimination investigations. See 22 California Administrative Code, Section 98410

58. Following the completion of the OCR investigation, the EEOC issued a "Notice of Right to Sue" to Dr. Mitchell on March 15, 1985. Mr. Patterson received a copy of the Notice on March 19, 1985. Dr. Mitchell had 90 days from receipt of the letter to commence an

action in the district court. Dr. Mitchell neither commenced a federal action within 90 days of the EEOC's Notice nor within one year of the DFEH's February 28, 1984 letter of deferral.

59. On June 25, 1985, Mr. Patterson received from the EEOC a copy of a charge that Dr. Mitchell had filed with the EEOC on June 13, 1985. This was charge No. 092850608. In this charge, Dr. Mitchell alleged that he was rejected for the positions of Assistant Dean of Academic Affairs and Assistant Dean of Occupational Education at Los Angeles Southwest College in retaliation for his having filed the previously described charges.

60. On July 22, 1985, Mr. Patterson was informed by a letter from the DFEH dated July 17, 1985 that the DFEH was going to defer investigation to the

EEOC and that Dr. Mitchell had one year from that date to file a private civil suit in state court

61. Dr. Mitchell's EEOC retaliation charge is still pending at EEOC.

62. On January 21, 1986, Mr. Patterson learned that Dr. Mitchell had filed his retaliation claim with the OCR as well as the EEOC. The OCR deferred to the EEOC.

63. The District currently employs approximately 132 certificated administrators. This population is the group eligible to serve in acting certificated administrative positions. Of this population, 69 individuals or 52.3% are white; 34 individuals or 25.8% are black and 29 individuals or 22% are other or racial minorities.

64. Since 1981, 39 of the 132 individuals appointed to probationary certi-

ficated administrative positions first served in an acting capacity. The Los Angeles Community College District is the largest college district in the state. Given the District's size and its scope of operation, many of the administrative positions are unique to the District. As a result, the required knowledge and experience needed to perform successfully can only be obtained by actually doing the job. These opportunities are made available on a basis which does not have a statistically significant relationship to one's race.

65. Of the 39 acting positions filled since 1981, eight positions went to individuals identifying themselves as black, 7 went to other minorities (self) identified) and 24 went to whites. Based on their representation in the pool of certificated administrators, one would

have expected 10 blacks to have been appointed, rather than eight; 9 other minorities, rather than 7; and only 20 whites, rather than 24.

66. Based on the numbers set forth above, Mr. Patterson calculated a chi square test for statistical significance on the issue of whether race is statistically related to the probability of a current certificated administrator receiving an acting appointment. The test rejected the conclusion that they are related.

67. The District general fund budget is made up of funds from the State of California's own general funds, of funds allocated by the state as the District's share of local property tax revenues, and of funds from miscellaneous other sources.

68. Likewise, all funds derived

from the state lottery come to the District pursuant to a formula developed and administered by the state. No funds are received directly.

69. Present state policy for community college finance, which has remained consistent since the enactment of Article XIIIA of the California Constitution in 1978, requires the state to predetermine a district's total revenue pursuant to a formula, in order to calculate the state apportionment. Thus, if local property taxes increase, or if any other source of funding increases, state general funds available to a district will decrease, so that the total revenue stays constant in accordance with the state's predetermination.

70. In fiscal year 1984-85, for the first time districts were required by

the state to charge community college students an enrollment fee. The fee is set by the state, and the state keeps the revenues from the fee by offsetting community college district apportionments by the amount of the fee.

71. With respect to the individual defendants, all acts alleged in the complaint relate to their official capacities. At all times, the defendants acts were within the course and scope of their employment.

72. Plaintiff filed this action in state (sic) on July 17, 1986.

73. Plaintiff was not discriminated against by any of the defendants on the basis of race, sex or age.

74. Plaintiff was not deprived by any defendant of due process of law.

75. The defendants did not violate any constitutional right of the plain-

tiff.

76. Any irregularities in the defenda2ts' interview or recommendation procedure did not cause plaintiff any adverse consequences.

77. Any Conclusion of Law deemed to be a Finding of Fact is hereby incorporated into these Findings of Fact.

CONCLUSIONS OF LAW

1. Any Finding of Fact deemed to be a Conclusion of Law is hereby incorporated into these Conclusions of Law.

2. A party cannot base a cause of action on direct constitutional grounds if some federal civil rights statute can provide the sought after remedy. Ward v. Caulk, 650 F.2d 1144, 1147-48 (9th Cir. 1981).

3. The statutory period for a cause of action based on section 1983 is determined by the applicable statutory

period for a personal injury cause of action. Wilson v. Garcia, 471 U.S. 261 280 (1985). California Code of Civil Procedure section 340 mandates a one year statutory period for personal injury actions.

4. Plaintiff's claims pursuant to 42 U.S.C. sections 1981 and 1983 arising before July 17, 1985 are barred by California's one year statute of limitations on personal injury causes of action. California Code of Civil Procedure section 340(3); Wilson v. Garcia 471 U.S. 261, 280 (1985) Section 1983 actions); Runyon v. McCrary, 427 U.S. 160, 179-182, (1976)(42 U.S.C. section 1981 governed by state's personal injury statute of limitations); McMillan v. Goleta Water District, 792 F.2d 14-53 (9th Cir. 1986), cert. denied, ___U.S. ___, 107 S.Ct. 1348 (1987).

5. Considering this case was filed on July 17, 1986, any injury that occurred prior to July 17, 1985 is therefore time barred. This includes all of plaintiff's claims relating to the Senior Director, Occupational and Technical Education position, the allegations of retaliation relating to the Assistant Dean positions at Los Angeles Southwest College starting June, 1984, and the District's alleging failure to properly investigate plaintiff's AB 803 complaint.

6. Plaintiff's Age Discrimination in Employmeno Act (ADEA) and Title VII claims are likewise time barred since the plaintiff failed to act within the required 90 days from the time that he received the notification of that right from the EEOC on March 15, 1985.

7. Even if the plaintiff's claims were not time barred, he has failed to

factually support his allegations of discrimination. This Court's analysis should be proceed (sic) along the lines of inquiry established for Title VII actions in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

8. A critical factor in proving a discrimination claim like the present one requires the plaintiff to prove that he is qualified for the sought after position. McDonnell Douglas, 411 U.S. at 802-03. In the present case, the undisputed evidence indicates not only was the plaintiff far less qualified for the position than the party that eventually filled the position but plaintiff was far less qualified than any of the other candidates. Plaintiff was consistently rated average at best or below average by the committee members during

his interview.

9. The District's "color blind" paper screening of applicant files is insufficient to create a prima facie case of employment discrimination with respect to this stage of defendants' hiring hiring process. See Mitchell v. Los Angeles County Superintendent of Schools, 805 F.2d 844, 846 (9th Cir. 1986).

10. In light of plaintiff's objective absence of qualifications, no evidence has been presented sufficient to create an inference that race played any part in the District's employment decisions. International Brotherhood of Teamsters v. U.S., 431 U.S. 324, 328 (1977); Mitchell, 805 F.2d at 846.

11. Plaintiff was not as qualified for the Senior Director, Occupational and Technical Education position as the

successful candidate.

12. Plaintiff's age discrimination claim is also unsupported by the facts since there is no evidence that plaintiff's age made any difference in the decision not to appoint plaintiff. See Cancellier v. Federated Department Stores, 672 F.2d 1312, 1316 (9th Cir. 1982). The evidence indicates that the decision not to hire the plaintiff resulted from his deficient qualifications in education and expertise, and had nothing to do with his age.

13. Plaintiff alleges that the Distict failed to hire him for either of two assistant dean positions in 1984 in retaliation for the plaintiff's filing of these claims. Plaintiff was interviewed for one of the positions on June 11, 1984 but was not one of the two candidates recommended to the Chan-

cellor. Both of the recommended candidates were later rejected. Plaintiff maintains that he has met the Ruggles v. California Polytechnic State University, 797 F.2d 782-86 (9th Cir. 1986) standard for setting forth a prima facie case of retaliation in the context of a failure to hire; namely, (1) the plaintiff was engaged in protected activity; (2) the plaintiff suffered an adverse employment decision; and (3) there was a nexus between the first and second elements. In plaintiff's case, the protected activity is seeking an investigation of his claim of discrimination; and the adverse employment decision is that he was allegedly not hired for the particular positions. However, the evidence clearly establishes that as to each incident the three criteria were not satisfied. In the first

instance, in which plaintiff was not hired as assistant dean, the party making the recommendations to the Chancellor was unaware that the plaintiff had even filed his discrimination claim. In the second instance complained of, the plaintiff was not subjected to an adverse employment decision.

14. Plaintiff's ADEA and Title VII claims are barred by his failure to commence an action within the 90 days of his receipt of the right to sue letter of March 15, 1985.

15. Plaintiff's state claims raised in his retaliation charge filed with the DFEH on June 13, 1985 are barred pursuant to California Government Code Section 12960.

16. Under California law, agencies of the state are not persons for purposes of 42 U.S.C. section 1983. Pyne v.

Meese, 172 Cal. App. 3d 392, 403, 218 Cal. Rptr. 87 (1985).

17. The District, its Board of Trustees and its employees share in the State's Eleventh Amendment immunity and are thus not subject to liability pursuant to 2201-2202 or 42 U.S. sections 1981, 1983, 1985 or 2000(d). Stones v. LACCD, 572 F. Supp. 1072 (C.D. Cal.1983) aff'd on other grounds, 796 F.2d 270 (9th Cir. 1986); see Edelman v. Jordan, 415 U.S. 651 (1974); Atascedero State Hospital v. Scalon, 473 U.S. 234 (1985) (Title IX does not constitute a waiver of State's Eleventh Amendment immunity and by analogy Title VI should not do so either); Green v. Monsour, 474 U.S. 64, (1985); Peters v. Lieuallen, 746 F.2d 1390, 1392 (9th Cir. 1982)(42 U.S. section 1981 liability against a state agency) and Foreman v. G.M., 473 F. Sup-

p. 166 (E.D. Mich. 1979)(28 U.S.C. section 2201-02 do not authorize suits against states and therefore cannot be used to circumvent the Eleventh Amendment.)

18. The individual defendants acting in their official capacity also share in the State's Eleventh Amendment immunity. Stones, supra, 572 F.Supp. at 1078; Jackson v. Hayakawa, 682 F.2d 1344, 1350 (9th Cir. 1982).

19. Plaintiff is not entitled to injunctive relief. Pugh v Alabama, 438 U.S. 781, 282 (1978); Stones, 572 F.Supp. at 1078; Pennhurst State School Hospital v. Halderman, 465 U.S. 89 (1984).

20. As employees performing discretionary functions, the individual defendants are shielded from liability insofar as their "conduct does not violate clearly established statutory or consti-

tutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 817-19 (1982).

21. Qualified good faith immunity extends to all liability, not just damages and the issue should be decided on summary judgment before the burdens of discovery interfere with the officials's performance of his or her duties. Mitchell v. Forsyth, 472 U.S. 511, 535-36 (1985).

22. The employment procedures utilized by the District are not discriminatory. Stones, 572 F.Supp. at 1075-76.

23. Plaintiff's state based constitutional and statutory claims are likewise time barred, pursuant to California Code of Civil Procedure section 340 and California Government Code section 12960 which would require a complaint for these actions to be filed within one

year of its occurrence.

24. There remains oo triable issues of material fact.

25. There will be no award of attorney fees.

26. Defendants are entitled to costs.

CONCLUSION

This Court grants all defendants' motions for summary judgment as to all claims both federal and state.

DATED: Sept 29, 1987

Wm. Matthew Byrne, Jr.
United States District Judge

14092 Daily Appellate Report

Thursday, November 10, 1988

CIVIL RIGHTS

Eleventh Amendment Immunity Protects School District From Discrimination Suit

Cite as 88 Daily Journal D.A.R. 14092

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD L. MITCHELL, JR., Plaintiff-Appellant, v. LOS ANGELES COMMUNITY COLLEGE DISTRICT; LESLIE KOLTAI; VIRGINIA F. MULROONEY; KENNETH S. WASHINGTON; CATHERINE CLOSE; WALTER C. MAC INTOSH; RODNEY L. PATTERSON, Defendants-Appellees.	)Nos. 87-6553))D.C.No. CV-86-5105 WMB)ORDER AND OPINION

Appeal from the United States District Court for the Central District of California, William Matthew Byrne, Jr., District Judge, Presiding

Submitted on Briefs August 5, 1988*
Pasadena, California

Before: M. Oliver Koelsch, Jerome Farris and Charles Wiggins, Circuit

Judges.

Opinion by Judge Wiggins

COUNSEL

Richard L. Mitchell, Jr., Los Angeles, California, for the Plaintiff-Appellant.

Warren S. Kinsler, Los Angeles Community College District, and Thomas Scheerer, Deputy Attorney General, Los Angeles, California, for the Defendant-Appellee.

ORDER

The Memorandum disposition filed herein is redesignated an Opinion, authored by Circuit Judge Wiggins

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OPINION

WIGGINS, Circuit Judge:

Richard Mitchell appeals from the district court's grant of summary judgment to the defendants. The appellant brought a complaint alleging employment discrimination based on age, sex and race. The complaint raised claims under 42 U.S.C. §§ 1981, 1983 and 1985; 29 U.S.C.

§§ 621-34 (Age Discrimination in Employment Act)(ADEA); 42 U.S.C. 2000e-2000e-17 (Equal Employment Opportunities) (Title VII); for declaratory and injunctive relief and pendent state claims. The district court found that the appellant's 1981, 1983 and 1985 claims, as well as his ADEA and Title VII claims, were barred by the statute of limitations. Alternatively, the court found that the appellant had failed to raise a genuine issue of material fact to support his allegations of discrimination. The court also found that the defendant Los Angeles Community College District (district) and the individual defendants, enjoyed eleventh amendment immunity from damages or injunctive relief. Further, the court held that the plaintiff's state based constitutional and statutory claims

were time barred under California law. We AFFIRM.

FACTS

The appellant, a 56 year old black male, was a teacher in various capacities in Los Angeles public schools and at various community colleges in the appellee's community college district. In October, 1981, Mitchell filed applications with the district for the positions of assistant dean and dean. The district maintained a "pool" of eligible candidates for these positions at the various Los Angeles community colleges. Members of ohe pool were eligible for these positions as they became open. Pool members did not have to reapply for these positions as they became available. In 1983, the appellant also applied for the position of Senior Dir-

ector of Occupational and Technical Education withthe district. This position was specially advertised and was not filled from a pool.

None of the application materials used by the district revealed an applicant's race to those making hiring deciaions. Since 1983, these materials also do not reveal an applicant's age. Mitchell became eligible for various assistant dean and dean positions but was never offered a position. He was not recommended for hire after he filed a discrimination claim against the district, but the defendant responsible for not recommending him was unaware of his action. Only four applicants were reviewed for the Senior Director position. An internal policy required that five people be interviewed for the position by a selection

committee; but, instead of readvertising the position, the district interviewed all of the applicants including Mitchell. All members of the selection committee rated him as below average in "Knowledge of the area of the position" and quality and amount of relevant experience. The committee rated the successful candidate a white woman, as "far above average" in these and all other categories of evaluation.

PROCEEDINGS

Early in 1984, the appellant filed a complaint against the district with the U.S. Department of Education Office for Civil Rights (OCR) alleging discrimination on the basis of race, sex and age in the district's Senior Director decision. Because the complaint alleged employment discrimination, the filing with OCR was deemed to be simultaneous

filing with the Equal Employment Opportunity Commission (EEOC). During the same time period, Mitchell also pursued internal remedies with the district as well as filing a charge with the State Department of Fair Employment and Housing(DFEH). The DFEH informed Mitchell that, pursuant to an agreement between the EEOC and the DFEH, it would defer its investigation to the EEOC. The EEOC, inturned, deferred its investigation to the OCR.[1]

On November 7, 1984, the OCR issued its findings and determination. It concluded that Mitchell was not selected because he lacked the necessary qualification for the Senior Director position and not because of his race, sex or age. The OCR also found insufficient statistical evidence to conclude that there was a pattern and

practice of discrimination on the basis of sex, race or age in the district's hiring for administrative positions. On March 15, 1985, the EEOC issued a "Right to Sue" notice to Mitchell. He received it on March 19, 1985. On July 17, 1986, Mitchell filed this action in state court. Apparently, all of the defendants except for appellee Catherine Close were properly served. The defendants removed the case to federal court. On March 19, 1987, a default was entered against Close. On April 27, 1987, the district court found good cause to set aside the default because Close was never properly served. On February 9, all the defendants moved for summary judgment. On September 30, 1987, the court granted summary judgment to all defendants on all claims.

The district court found that the de-

fendants did not discriminate against the plaitiff on the basis of race, age or sex, nor did they deprive him of due process. Relying on Wilson v. Garcia, 471 U.S. 261, 280 (1985) the court determined that a one year statue of limitations applied to Mitchell's 42 U.S.C. §§. 1981, 1983 and 1985 claims. Thus, any claims arising before July 17, 1985, were time barred. The court found these to include all claims relating to the district's hiring decisions regarding the Senior Director position, the retaliation claims, and the claims that the district failed to properly investigate Mitchell's internal claim. The court also found that the plaintiff's ADEA and Title VII claims were barred because he failed to bring this action within 90 days of the EEOC's "Right to Sue" notice. Alternatively, the court

found that the appellant had failed to make out a prima facie case Title VII employment discrimination claim under McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973), because the undisputed evidence showed that Mitchell was not qualified for the Senior Director position. The court also found no evidence of discrimination on the basis of age. As to the assistant dean and dean positions, the court found no evidence that the appellant was not hired in retaliation for filing his various complaints because the person responsible for the hiring decision was unaware of them.

The court also found that the district was an agency of the state and thus enjoyed eleventh amendment immunity from Mitchell's suit in damages and his request for injunctive relief. The

court further found that all the facts alleged in the plaintiff's complaint related to actions by the defendants in their official capacities, acting within the course and scope of their employment. Therefore, the court found that they shared the district's eleventh amendment. Alternatively, as employees performing discretionary functions, the court found ohese defendants to possess a qualified good faith immunity from the appellant's suit based on Harlow v. Fitzgerald, 457 U.S. 800, 817-19 (1982). The court held that all the plaintiff's state claims were time barred under California law. The court awarded no attorney's fees to the defendants. The appellant timely appealed. We have jurisdiction under 28 U.S.C. § 1291.

DISCUSSION

A grant of summary judgment is re-

viewed de novo, Darring v. Kincheloe, 783 F.2d 874, 876 (9th Cir. 1986).

1. Eleve th Amendment

Under the eleventh amendment, agencies of the state are immune from private damage actions or suits for injunctive relief brought in federal court. Pennhurst State School & Hosp. v. Holderman, 465 U.S. 89, 100 (1984) (eleventh amendment proscribes suit against state agencies "regardless of the nature of the relief sought"); Alabama v. Pugh, 438 U.S. 781 (1978)(per curiam). To determine whether a governmental agency is an arm of the state, the following factors must be examined: whether a money judgment would be satisfied out of state funds, whether the entity performs central governmental functions, whether the entity has the power to take property in its own name or only the name of the

state, and the corporate soatus of the entity. Jackson v. Hayakawa, 682 F.2d 1344, 1350 (9th Cir. 1982). To determine these factors, the court looks to the way state law treats the entity. Mount Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977); Rutledge v. Arizona Bd. of Regents, 660 F.2d 1345, 1349 (9th Cir. 1981), aff'd. sub nom. Kush v. Rutledge, 460 U.S. 719 (1983).

California cases demonstrate that California state colleges and universities are "dependent instrumentalities of the state." Hayakawa, 682 F.2d at 1350 (citing Slivkoff v. California State Univ. ano Colleges, 69 Cal.App. 3d 394, 400, 137 Cal.Rptr. 920, 924 (1977)(California state universities colleges are subject to full legislative control") and Poschman v. Dumke, 31 Cal.App.3d 932, 942,

107 Cal.Rptr. 596, 603 (1973)(The Trustees of California State Colleges are a state agency created by the Legislature")). As the district court noted, the district's budget is made up of funds received from the state's general fund pursuant to a state calculated formula. In addition, some fees charged by the district's colleges go the state. We hold that, under California law, the district is a state entity that possesses eleventh amendment immunity from the appellant's section 1981, 1983 and 1985 claims in damages and for injunctive relief. Likewise, the individual defendants share in the district's eleventh amendment immunity because they wrre sued in their official capacities. Such suits "are in essence, actions against the governmental entity of which the officer is an agent." Hayakawa, 682 F.2d 1350; see Monell v.

New York City Dept. of Social Servc., 436 U.S. 658, 690 n.55 (1978).

II. ADEA and TITLE VII.

42 U.S.C. § 2000e-5(f)(1)(Civil action by Commission, Attorney General, or person aggrieved) requires that an aggrieved party bring suit in court within 90 days of receipt of a "Right to Sue" notice. The day day requirement is mandatory and jurisdictional. Wong v. Bon Marche, 508 F.2d 1249, 1251 (9th Cir. 1975)(per curiam). The appellant filed this suit raising these claims one year and five months after receipt of his "Right to Sue" notice, well after the 90 day period. We hold that the appellant is thus barred from raising his ADEA and Title VII claims.

III. STATE CLAIMS.

Cal. Civ. Proc. Code § 340(1) (West Supp. 1988) and Cal. Gov.Code § 12960

(Procedure for prevention and elimination of unlawful employment practices) (West 1980) both require that actions challenging such allegedly unlawful employment practices be brought within one year of the practices complained of. The last actions at issue by the district occurred in 1983 or 1984. The appellant brought this action in July of 1986. We hold that the appellant's state claims are thus time barred

IV. DEFAULT.

The district court set aside the clerk of the court's entry of default against appellee Close. A district court's decision to enter or set aside a default is reviewed for an abuse of discretion. Aldabe v. Aldabe, 616 F.2d 1089 (9th Cir. 1980). The court found that Close had never been properly served by the appellant. Apparently, the

appellant assumed that service on the district was sufficient to serve Close. Close, however, is not an employee of the district. Rather, she is a state employee who works for the state community college board in Sacramento. Also, Close was not represented by the same counsel as were the rest of the defendents. It was not an abuse of discretion to set aside the default on these grounds.

V. ATTORNEYS' FEES-CROSS APPEAL

The defendants moved for an award of attorneys' fees under 42 U.S.C. § 1988. The district court denied the appellant's (sic) application for attorneys' fees. Attorneys' fees decisions under section 1988 are reviewed for an abuse of discretion. Hensley v. Eckerhart, 461 U.S. 424, 437 (1983); Hardin v. White Mountain Apache Tribe, 779 F.2d

476, 480 (9th Cir. 1985). In a civil rights case, fees may be awarded against an unsuccessful plaintiff only if his action is "meritless in the sense that it is groundless or without foundation." Hughes v. Rowe, 449 U.S. 5, 14 (1980); Dooley v. Reiss, 736 F.2d 1392, 1396 (9th Cir.), cert. denied, 469 U.S. 1038 (1984). The appellees heatedly assert that Mitchell's cause of action is meritless and he brought it for vexatious purposes. Their contention is cast more as a quest for sanctions under Fed.R. Civ.P. 11 than a request for attorneys' fees under section 1988. Only in exceptional cases should defendants be awarded attorneys' fees in a civil rights case. See Mitchell v. Los Angeles County Superintendent of Schools, 805 F.2d 844, 848 (9th Cir. 1986), cert. denied 108, S.Ct. 168 (1987)(same plaintiff).

Though Dr. Mitchell ultimately did not prevail in his case, we hold that the district did not abuse its discretion by denying the defendants attorneys' fees.

CONCLUSION

For the reasons stated above we AFFIRM.

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* The panel finds this case appropriate for submission without oral argument pursuant to Ninth Circuit Rule 34-4 and Fed.R.App.P. 34(a).

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[1] On June 17, 1980, the appellant filed another complaint alleging that he was rejected for the assistant dean and dean positions in retaliation for his previous complaints. This charge is still pending before EEOC. The DFEH again has deferred investigation to the EEOC and informed the appellant on July 17, 1985, that he had one year from that date to file a private civil suit in state court.

(2)

88-1622

No. _____

Supreme Court, U.S.
FILED
MAR 31 1989
JOSEPH F. SPANIOL, JR.
CLERK

INTHE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

RICHARD L. MITCHELL, JR.,

Petitioner,

V.

THE BOARD OF TRUSTEES OF THE LOS ANGELES COMMUNITY COLLEGE DISTRICT, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDICES D-1 THRU V-1

SEPARATE VOLUME

RICHARD L. MITCHELL, JR.
1282 Redondo Boulevard
Los Angeles, CA 90019

Petitioner in Propria Persona

D-1

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

No: CV 86-5105-WMB Date: Sept. 29, 1986

Richard L. Mitchell, Jr., v. Board of Trustees, etc., et al.

DOCKET ENTRY:

HON. Wm. MATTHEW BYRNE, JR., JUDGE

Duane Hostetter-Deputy Clerk

Rosa Treibach-Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

Richard Mitchell, ipp

ATTORNEYS PRESENT FOR DEFENDANTS

Warren Kinsler

PROCEEDINGS: Plaintiff's motion to remand to State Court.

The Plaintiff is present in pro per. Defendants counsel is present. The motion to remand is argued to the Court. The motion is denied

Initials of Deputy Clerk _____

FILED NOV 21 1987
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD L. MITCHELL, JR., Plaintiff-Appellant, vs. LOS ANGELES COMMUNITY COLLEGE DISTRICT, et al., Defendants-Appellees.	No. 87-5966 DC# CV-86-5105 WMB Central California ORDER

Before: ALARCON, NORRIS and LEAVY, Circuit Judges

Appellant's response to the order to show cause fails to demonstrate good cause why this appeal should not be dismissed for lack of jurisdiction. The district court's order granting a motion to vacate the default judgment is not a final, appeable order and the appellant has not otherwise shown that the order is final. 28 U.S.C. § 1291; see also Resnik v. La Paz Guest Ranch

289 F.2d 814, 817 (9th Cir. 1961).

Therefore, the appeal is dismissed for lack of jurisdiction.

MoCal 11/20/87
dp

F-1

FILED JAN 3 1989
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD L. MITCHELL, JR., Plaintiff-Appellant, vs. LOS ANGELES COMMUNITY COLLEGE DISTRICT; LESLIE KOLTAI; VIRGINIA F. MULROONEY; KENNETH S. WASHINGTON; CATHERINE CLOSE; WALTER C. MAC INTOSH; RODNEY L. PATTERSON, Defendants-Appellees.	No.87-6553 No.87-6618 D.C. No. CV 86-5105-WMB ORDER

Before: KOELSCH, FARRIS, and WIGGINS, Circuit Judges

The request to de-publish is denied.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD L. MITCHELL, JR., Plaintiff-Appellant, vs. LOS ANGELES COMMUNITY COLLEGE DISTRICT; LESLIE KOLTAI; VIRGINIA F. MULROONEY; KENNETH S. WASHINGTON; CATHERINE CLOSE; WALTER C. MAC INTOSH; RODNEY L. PATTERSON, Defendants-Appellees.	Nos. 87-6553; 87-6618 D.C.No. CV-86-5105-WMB ORDER AND AMENDED OPINION

Appeal from the United States District Court for the Central District of California, William Matthew Byrne, Jr., District Judge, Presiding

Submitted on Briefs August 5, 1988*
Pasadena, California

Memorandum Filed August 17, 1988
Opinion Filed November 8, 1988
Amended January 11, 1989

Before: M. Oliver Koelsch, Senior Circuit Judge, Jorome Farris and Charles Wiggins, Circuit Judges.

Opinion by Judge Wiggins

* The panel finds this case appropriate

260 MITCHELL V. LOS ANGELES COMMUNITY COLLEGE

SUMMARY

PUBLIC EMPLOYEES

Affirming a grant of summary judgment, the court held that a college district is a state entity possessing eleventh amendment immunity from 42 U.S.C. §§ 1981, 1983, and 1985 claims for damages and for injunctive relief.

Plaintiff-appellant Richard Mitchell appeals from the district court's grant of summary judgment to the defendants. Mitchell brought a complaint alleging employment discrimination based on age, sex and race against the defendants community college district's decision to hire someone else for the position of Senior Director. The complaint raised

for submission without oral argument pursuant to Ninth Circuir Rule 34-4 and Fed.R.App.P. 34(a).

claims under 42 U.S.C. §§ 1981, 1983, and 1985; 29 U.S.C. §§ 621-34; 42 U.S.C. §§ 2000e-2000e-17; for declaratory and injunctive relief and pendent state claims. The district court found that the appellant's 1981, 1983 and 1985 claims, as well as his ADEA and TITLE VII claims, were barred by the statute of limitations. Alternatively, the court found that the appellant had failed to raise a genuine iss of material fact to support his allegations of discrimination. The court also found that the defendant Los Angeles Community College District and the individual defendants, enjoyed eleventh amendment immunity from damages of injunctive relief. Further, the court held that the plaintiff's state based constitutional and statutory claims were time barred under California law. Because California state colleges and uni-

versities are dependent instrumentalities of the state, the district is a state entity that possesses eleventh amendment immunity from the appellant's section 1981, 1983 and 1985 claims in damages and for injunctive relief. Likewise, the individual defendants share in the district eleventh amendment immunity because they were sued in their official capacities.

Mitchell filed his ADEA and Ttle VII claims one year and five months after receipt of his Right to Sue notice, well after the 90 day period. Mitchell's state claims were brought, at a minimum, two years after the unlawful employment practices occurred. This is at least one year after the one year period provided.

COUNSEL

Richard L. Mitchell, Jr., Los Angeles,

California, for the plaintiff-appellant

Warren S. Kinsler, Los Angeles Community College District, and Thomas Scheerer Deputy Attorney General, Los Angeles, California, for the defendant-appellee.

ORDER

It is ordered that the opinion filed November 8, 1988, is hereby amended as follows:

The last sentence in "II, ADEA and TITLE VII," is deleted and the following inserted therefor:

We hold that the appellant is thus barred from raising his Title VII claim. The appellant's ADEA claim is similarly time barred because he failed to bring suit within two years of the date of his cause of action accurued. 29 U.S.C. § 626(e)(1)

ADMINISTRATIVE OFFICES

LESLIE KOLTAI
Chancellor

LOS ANGELES COMMUNITY COLLEGES
617 West Seventh St.
Los Angeles, CA 90017
(213) 628-7788

Dr. Richard L. Mitchell, Jr.
1282 Redondo Boulevard
Los Angeles, CA 90019

Re: Investigative Findings conducted by the Office for Civil Rights, dated April 14, 1986, and Documents compiled by this Federal Agency in conducting their investigation in HENRY v. LOS ANGELES COMMUNITY COLLEGE DISTRICT, Docket No. 09-85-2060.

Dear Dr. Mitchell:

I am enclosing and attaching herein the investigative findings conducted by the Office for Civil Rights regarding my complaint of discrimination against the above educational institution.

I am also enclosing for your use documents that the Office for Civil Rights (OCR) used during their investigation that enabled them at reaching their de-

cision. (See page 4 of the enclosed findings). As you know,, I obtained these documents pursuant to the Freedom of Information Act, 5 U.S.C. Section 552. Since our charges are the same and we both competed for the same position of Senior Director of Occupational & Technical Education, and having been denied other similar positions on the same basis, this information should prove helpful to you and the Equal Employment Opportunity Commission in their investigation of your charge. If I can be of further help, please let me know.

Sincerely,

DEWEYLENE D. HENRY
ASSISTANT DIRECTOR
STUDENT SERVICES

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

REGIONAL OFFICE
221 Main St., 10th Floor April 14, 1986
San Francisco, CA 94105

Mrs. Deweylene D. Henry
6031 Sherbourne Drive
Los Angeles, CA 90056

(In reply, please refer to Docket No. 09-85-2060)

Dear Mrs. Henry:

The Office for Civil Rights (OCR) has completed its investigation of the discrimination complaint filed by you against the Los Angeles Community College District (LACCD). The investigation was conducted under the jurisdiction of 34 C.F.R. § 100.7 and § 100.3 of the regulation implementing Title VI of the Civil Rights Act of 1964, 34 C. F.R. § 100.7 (e) of the regulation prohibits recipients from retaliating against individuals who have complained, assisted or otherwise participated in

an OCR investigation; and 34 C.F.R. § 100.3(c)(3) of the regulation prohibits discrimination on the basis of race in the employment practices of the recipient. Specifically, you alleged that (a) you were denied a merit increment in retaliation for filing a complaint with OCR, and (b) 'Anglos' in acting administrative positions in the educational Services Division are given preferential treatment when being considered for permanent positions, resulting in fewer opportunities Blacks.

1. Allegation: Retaliation

In investigating retaliation complaints, OCR uses a three step analysis to determine whether illegal retaliation may have taken place. OCR must first establish that the complainant was involved in a protected activity. Next, OCR must establish that an adverse action took

place and thirdly, whether there was a casual connection between the protected activity and the adverse action. If the three conditions are met, a prima facie case of retaliation has been established. The burden of proof then shifts to the recipient who must articulate a legitimate non-discriminatory reason for its action. OCR then examines the proffered reason to determine its credibility in light of the totality of circumstances.

Findings

OCR's investigation is established that you were involved in a protected activity when you filed a complaint with our office in December of 1983. An adverse action was taken against you when you were denied merit increment. The preponderence of the following evidence suggests that there was a casual connection

between your participation in a protected activity and the adverse action taken against you.

A. Dr. Washington, Vice-Chancellor of the Education Services Division, who denied you the increment, was aware that you previously filed a complaint with our office. He was interviewed during the investigation of your previous complaint.

B. For the last three years, 1982-83, 1983-84, and 1984-85, you have been eligible to receive a merit increment. You received two merit increments and was denied one. The 1984-85 merit increment that you did not receive occurred after you filed a complaint with our office.

C. You were evaluated and denied a merit increment for the 1984-85 academic year on November 28, 1985. All

other administrators in the Educational Services Division were evaluated and granted a merit increment on August 14, 1984. Dr. Washington could not explain to OCR why your particular merit increment evaluation and subsequent denial were over three months late.

D. You were the only administrator in the Educational Services Division that was denied merit increment for the 1984-85 academic year.

E. According to Mr. David Agosto, your immediate supervisor, he initially recommended that you be denied a merit increment for the 1984-85 academic year because of the number of days you were absent from your work. Mr. Agosto told OCR that after you appealed the denial of your merit increment to Dr. Mulrooney, Vice-Chancellor of Personnel he check your attendance records for

1984-85 and found out that you were not absent as much as he initially thought. According to Mr. Agosto, he notified Dr. Washington, Dr. Mulrooney and Mr. Patterson, LACCD's Affirmative Action Officer, of his mistake and recommended that you receive the merit increment. Dr. Mulrooney stated to OCR that she does not remember speaking to Mr. Agosto. OCR was unable to confirm whether this conversation took place with Dr. Washington since he was not available to be interviewed on this subject. But Mr. Patterson told OCR that he does remember a conversation with Mr. Agosto when Mr. Agosto admitted that he does remember a conversation with Mr. Agosto when Mr. Agosto admitted that he made a mistake concerning evaluation and that he now recommended that you receive the merit increment. Dr. Washingto stated

to OCR that you were did not receive the merit increment because your work performance was average to below average and that you had one of your major responsibilities, Child Development Program, taken away because of poor work and because of your attitude.

With respect to the contention that your work was average to below average, seveeral factors undercut this argument. First, Mr. Agosto, your immediate supervisor, stated to OCR that you are an above average to excellent employee and should have received the merit increment that was denied to you. Second, 75% of the Athletic and EOPS directors that OCR interviewed stated that you performed an above average to excellent job as it related to their programs. Third, Dr. Washington could not provide OCR with any documentation or witnesses that could

substantiate his allegation that your work was average to below average. With respect to the credibility of Dr. Washington's assertion that your merit increment was denied because the Child Development Program was transferred from you based on your poor work and attitude, several factors undercut this argument. First, the duties and responsibilities of the Child Development Program were not transferred to another administrator until after you were evaluated for the merit increment. Second, the Child Development Directors did not express their dissatisfaction with you and your assistant until one month after the date you should have been evaluated. Third, Mr. Blair Sillers, Assistant to the Chancellor, stated to OCR that the Child Development Program was not transferred from you because of your poor

performance but because it was felt that the program would run more smoothly under another administrator. Even though OCR found some evidence indicating that the Child Development Program was removed from you due to a personality conflict between you, your assistant and the Child Development Director, OCR concludes that this evidence does not have a bearing as to whether you should have received a merit increment because the transfer of the Child Development Program occurred: (1) after the date you should have been evaluated; and (2) after the date you were evaluated. Consequently, OCR found that LACCD's explanation for denying you the merit increment lacks credibility and concluded that LACCD retaliated against you. After reaching its preliminary conclusion, OCR notified Ms. Mary Dowell, LACCD's General Counsel, of OCR's antici-

pated findings. In order to resolve the issue of retaliation, Ms. Dowell agreed, on behalf of the District, to do the following:

1. Pay you a lump sum of Seven Hundred twenty-Eight Dollars ($728.00). This payment is to compensate you for the 1984-85 merit increment that was denied you.

2. Change your permanent records so they reflect the fact that you were granted a merit increment for the 1984-85 academic year.

This resolution was reached without an admission of retaliation or liability by LACCD. OCR finds that this resolution is sufficient to remedy the finding of retaliation in this allegation. The prompt implementation of this remedy is necessary for LACCD to come into compliance with the regulation. It is our understanding that this remedy will be imple-

mented within ten days of receipt of this letter. LACCD will provide OCR with a copy of the document that will be issued concerning this action.

Allegation: Selection

In investigating this allegation, OCR reviewed the applications of all candidates interviewed for each applicable position, and the ½olicy and procedures used by LACCD to select certificated administrators.

Findings

Selection of certificated administrative employees follows procedures outlined in LACCD's Personnel Guide, section B456. Applications are accepted and reviewed by the Personnel Services Division to determine if the applicant meets the minimum qualifications, such as position specifications and credential requirements. For those who possess the minimum qualifica-

tion (education, experience and certification), confidential reference forms are sent to the last five references listed by the applicant. The selection/interview committee formed by the appropriate Vice Chancellor or President reviews all the files and selects the five most qualified candidates for an interview. Each member is requested to read the applicant's files prior to the interview. The interview session is conducted individually. Each member evaluates the candidates on the "Campus Interview Committee Evaluation Form". Following the completion of the rating sheet, the members give their ranking of the candidates to the Vice Chancellor. The Vice Chancellor submits to the Chancellor the names of the the two best qualified. The Chancellor recommends one candidate to the Board of Trustees

in a closed session. OCR's investigation revealed that only six of the nine positions identified by you underwent the competitive hiring process described above. OCR's investigation also revealed that all six positions were filled with the current acting administrator and that all six acting administrators were white. All candidates for each position were asked the same questions and were interviewed for approximately the same amount of time. The totality of the evidence shows that (1) all successful applicants for permanent positions were white; (2) all successful applicants for permanent positions had foremerly been acting in those positions prior to their selection; (3) experience gained in an acting capacity was a major factor in the selection of the successful candidates, as indicated by

the rating forms; and (4) that while many of the minority applicants were interviewed for the permanent positions, many of them did not have the requisite experience to successfully compete with the white applicants, who had obtained that experience during their acting appointments. OCR, therefore, concludes that there was a pattern of appointing whites for acting positions and that the experience gained in that capacity allowed the candidate an advantage in the select- for permanent positions. The next step in our investigatory process would normally involve an investigation of the process of appointing candidates to acting positions. This investigation would have focused on the criteria for selecting candidates to acting positions, the availability of qualified minority candidates, and the efforts, if any, to at-

tract qualified candidates for acting positions. Prior to the initiation of this phase of the investigation, OCR presented its preliminary findings to LACCD. Without admitting any discriminatory pattern or practice in its selection procedures, and in an effort to resolve this issue of the complaint, LACCD agreed to take the following actions as soon as they receive this Letter of Findings.

1. The District will continue to abide by its own rules and regulations in the making of appointments, with special emphasis being placed on advising all persons who participate on selection committees of the need to give specific reasons for their evaluations.

2. The District agrees that no acting appointment in the Educational Services Division made after the date of execution of a settlement agreement will be for

a duration longer than one year. The only exception to this time limit would be where a person is serving in an acting position because the incumbent of the position is on leave from which he or she is expected to return without separation from District employment.

3. The District agrees that when an acting appointment is made, the appointing authority shall be required to submit a written statement which will be retained in the appointee's personnel files explaining what factors or qualities about the appointee caused him or her to be selected.

4. The District agrees that acting appointments shall be consistent with its affirmative action program, and an Evidence of Effort form will be submitted to the District's Office of Affirmative Action Programs and Services, in

accordance with that Office's rules and regulations, when any acting appointment is made.

OCR determined that the implementation of these actions is sufficient to resolve this aspect of the complaint, and OCR makes no finding on this issue contingent on the complete adherence to the agreed upon remedial committments made by LACCD.

This correspondence represents closure of this complaint. This finding should not be interpreted to cover civil rights issues not specifically addressed herein. Under the Freedom of Information Act, it may be necessary to release this document and related correspondence upon request. In the event OCR receives such a request, we will protect, to the extent provided by law, other personal infor-

mation which, if released, would constitute unwarranted invasion of privacy. If you have any questions, please contact Mr. Michael Brown at (415) 227-8117.

Sincerely,

John E. Palomino
Acting Regional
Director

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HONORABLE WILLIAM MATTHEW BYRNE, JR.

JUDGE, PRESIDING

RICHARD L. MITCHELL, JR.,

Plaintiff,

vs.

LOS ANGELES COMMUNITY COLLEGE.

Defendant.

CV-86-5105 WMB

REPORTER'S TRANSCRIPT OF PROCEEDINGS

PLAINTIFF'S MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT

MONDAY, JANUARY 12, 1987

VERNA R. MORON
COURT REPORTER PRO TEM
UNITED STATES DISTRICT COURTHOUSE
312 NORTH SPRING STREET
LOS ANGELES, CA 90012
(213) 894-3015

APPEARANCES:

FOR THE PLAINTIFF:

RICHARD L. MITCHELL, JR.
IN PRO PER
1282 REDONDO BOULEVARD
LOS ANGELES, CALIFORNIA 90019

FOR THE DEFENDANT:

WARREN KINSLER, ESQ.
ATTORNEY AT LAW
617 WEST 7TH STREET
LOS ANGELES, CALIFORNIA 90017
(213) 628-7788

LOS ANGELES, CALIFORNIA: MONDAY, JAN 12, 1987.

THE COURT CLERK: Item No. 11, CV-86 5105, Richard Mitchell vs. Los Angeles Community College District. Counsel, please state your appearances for the record.

MR. KINSLER: Good morning, Your Honor Warren Kinsler for the Defendant.

MR. MITCHELL: Richard Mitchell.

THE COURT: This complaint isn't much I am going to allow him to file it; and it is best attacked by way of a Motion to Dismiss.

MR. KINSLER: L'll be bringing my motion by way of a Motion for Summary Judgment.

THE COURT: Okay.

MR. KINSLER: I'll just file it within the rule.

MR. MITCHELL: Your Honor, I'm sorry

I didn't understand.

THE COURT: You wouldn't at this point.

MR. KINSLER: Let me make a suggestion. If you are expecting a Motion to Dismiss in 20 days, may I ask for an additional 10, Your Honor?

THE COURT: I'll grant 30 days to answer or otherwise respond.

MR. MITCHELL: Your Honor, do I also get an enlargement of time to serve the defendants?

THE COURT: You don't have to serve the defendants. You've got everybody served.

MR. KINSLER: No, he doesn't your Honor.

THE COURT: Can you accept service?

MR. KINSLER: I can't accept service.

THE COURT: We'll have to give him additional--I'll give you 20 days. All right. Thank you very much.

MR. KINSLER: Thank you. Your Honor.

I, Verna R. Moron, Court Reporter Pro Tem, do hereby certify that the foregoing is a true and accurate transcript of the minutes of the within proceeding.

VERNA R. MORON
COURT REPORTER PRO TEM

J-1

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HONORABLE WILLIAM MATTHEW BYRNE, JR.

JUDGE, PRESIDING

RICHARD L. MITCHELL, JR.)) Plaintiff,)) vs.)) THE BOARD OF TRUSTEES OF) THE LOS ANGELES COMMUNITY) COLLEGE DISTRICT, et al.,))	CV-86-5105 WMB

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Monday, March 23, 1987

10:00 A.M.

ROSA TREIBACH, CSR
Official Court Reporter
429-F United States Courthouse
312 North Spring Street
Los Angeles, California
(213) 626-0132

APPEARANCES OF COUNSEL:

Plaintiff in Propria Persona

Richard L. Mitchell, Jr.
1282 Redondo Boulevard
Los Angeles, California 90019

For Defendant CATHERINE CLOSE:

John K. VAN DE KAMP,
Attorney General of the State
of California

THOMAS SCHEERER, ESQ.
Deputy Attorney General
3580 Wilshire Boulevard
Room 800
Los Angeles, California 90010

Hearing re Defendant Close's motion to dismiss or for summary judgment

THE COURT: All right. We will take the Mitchell case.

MR. SCHEERER: Good morning, Your Honor. Thomas Scheerer, Deputy attorney general for Catherine Close and the State Employment Department.

THE COURT: All right.

MR. MITCHELL: Good morning, Your Honor. Richard Mitchell, plaintiff in pro per.

THE COURT: Mr. Mitchell.

All right. Do you desire to say anything on behalf of your motions?

MR. SCHEERER: Nothing, Your Honor.

THE COURT: All right. Mr. Mitchell, do you desire to be heard in opposition to the motion.

MR. MITCHELL: Yes, Your Honor. The issue before the Court involved case law is improper. The issue before this Court, according to Mr. Scheerer, is a motion for dismissal and on summary judgment.

On March 9th of this -- last week, the defendants' attorney for the Board of Trustees brought a similar issue, as the Court recall. That issue is also improper. As the Court recalls, January the 12th, '87, you ordered the defendants to answer my complaint. As of this date, no answer has been filed with this Court. The issue is whether a motion to dismiss or summary judgment is a responsive pleading pursuant to Rule 7(a). Now the Court recalls 7(a) states that--Federal Rule of Civil Procedure states that in every proceeding that shall be a complaint and an answer.

Now, a motion to dismiss or for summary judgment is precluding the federal rule of civil procedure.

THE COURT: Well, you are wrong on that issue; so I'd move to the next issue. IN other words, it is not necessary that

someone answer before they file a motion to dismiss. As a matter of fact, the opposite is normally true, and the same is true with bringing of a motion for summary judgment; so let's proceed to your next point.

MR. MITCHELL: You take all the steam out of my argument, Your Honor. I am going to respectfully differ with the Court pursuant to section 471.5, and I respectfully differ with the Court because it reads thus: "If a complaint is amended, a copy of the amendment shall be filed." The second portion: "The defendant shall answer the amendment of the complaint as amended." That's California Code of Civil Procedure, and as of this date, the defendants have not filed an answer. I'll proceed to the other section. The other section is Assembly Bill 803. Miss Close has a duty

and responsibility. That's shown in my complaint in Exhibit N. Ms. Close has a responsibility and a duty to investigate my complaint of retaliation. She, on three occasions -- I wrote to make sure that I understood that she refused-willfully refused, as is shown in Exhibit N,to investigate the complaint. I go back. A letter was submitted to me by Miss Deweylene Henry where Miss Close did in fact investigate her complaint.

Same position. Same position, same appeal, Assembly Bill 803. She investigated that complaint. She referred me to the Department of Fair Employment and Housing. December of this past year, I followed her direction, went to the Fair Employment and Housing. They said we caonot investigate your retaliate claim.

So it just shows that Miss Close has willfully violated Assembly Bill 803 and

my rights to a fair and full hearing pursuant to Miles versus Affiliated Property and Craftsmen. Thats a Ninth Circuit Case. That's a 1984 case. A full and fair hearing is mandated and calling for a person to receive due process and equal protection of the law. She just simply claimed, without any provocation whatsoever, "I refuse to investigate your complaint." I sent her three letters to make sure that this was her decision, not just mine, and I think this is incorporated in the defendants' motion before this Court to date. So with this in mind, I'll let the --

THE COURT: All right. Thank you.

Do you desire to be heard?

MR. SCHEERER: No, Your Honor. I submit it.

THE COURT: All right. I will issue an order in this motion as well as the pre-

vious motion last week--

MR. SCHEERER: Thank you, Your Honor.

THE COURT: -- and they will be combined.

MR. MITCHELL: Thank you.

THE COURT: All Right. Thank you very much.

(Proceedings concluded.)

I CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPT FROM THE STENOGRAPHIC RECORD OF PROCEEDINGS IN THE FOREGOING MATTER.

ROSA TREIBACH, CSR July 1,1987

DATE

K-1

FILED JUL 17 1987

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA
HONORABLE WILLIAM MATTHEW BYRNE,JR.
JUDGE, PRESIDING

RICHARD L. MITCHELL, JR., Plaintiff, vs. THE BOARD OF TRUSTEES OF THE LOS ANGELES COMMUNITY COLLEGE DISTRICT, et al., Defendant.	No. CV 86-5105 WMB

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Monday, April 27, 1987

10:00 A.M.

ROSA TRIEBACH, CSR
OFFICIAL COURT REPORTER
429-F United States Court-
house
312 North Spring Street
Los Angeles, CA 90012
(213) 626-0132

APPEARANCES OF COUNSEL:

Plaintiff in Propria Persona

RICHARD L. MITCHELL,JR.
1282 Redondo Boulevard
Los Angeles, California 90019

For Defendant CATHERINE CLOSE:

JOHN K. VAN DE KAMP
Attorney General of the State
of California

HENRY G. ULLERICH, ESQ.
Supervising Deputy Attorney
General
3580 Wilshire Boulevard
Room 800
Los Angeles, California 90010

Hearing re Defendant Close's motion to set aside the Default.

THE CLERK: Item No. 5, CV 86-5105, Richard Mitchell versus the Board of Trustees for Defendant Close's motion to set aside the default.

MR. ULLERICH: Good morning, Your Honor. Henry Ullerich, U-l-l-e-r-i-c-h-, deputy attorney general for the moving party.

MR. MITCHELL: Good morning, Your Honor. Richard Mitchell --

THE COURT: All right. Mr. Mitchell, I'll listen to you. I'll listen to you, yes, as to why I should not set aside the default.

MR. MITCHELL: Well, Your Honor, first of all, its very clear in my brief that the attorney has not filed a substitution in this matter to give him proper standing to represent Close, is the first objection I have and the primary objection, and this particular objection has been repeated in the defendants'

motion for summary judgment. And secondly, that Benny v. Pipes conclusively proved that the Ninth Circuit held that where there has been--they have been properly served and there has not been an answer, then an entrance for default is granted. That's the basis of my argument.

THE COURT: All right. The motion is granted. I am going to set aside the default. There is good cause why it should be set aside. How much time to answer?

MR. ULLERICH: I believe there are motions to dismiss, and summary judgment is pending at this time.

THE COURT: Yes. The motion to dismiss or summary judgment is not granted. You will have 15 days after the entrance of the entrance of the order to answer.

MR. ULLERICH: All right. Thank you.

THE COURT: Thank you very much.

MR. MITCHELL: May I ask for clarification please?

THE COURT: Yes, sir.

MR. MITCHELL: The only argument that the defendant's attorney makes here is that he is an attorney. Th's the only counsel..It is his fault. I think that the Court would look at that very seriously, if just being an attorney is an excusable mistake for him to set-- for the Court to set aside the default, then this is not only harmful and prejudice to the plaintiff's action, but I don't stand a ghost of a chance.

THE COURT: You don't what?

MR. MITCHELL: I don't stand a ghost of a chance.

THE COURT: You are the same one, aren't you, that's been here over the last ten months that I have granted

you rights to add additional parties. You misserved this individual in the first instance. There is adequate good cause, substantial good cause to allow this default to be set aside, and if don't think you stand a chance, there are remedies that you can take. The motion is granted.

MR. ULLERICH: Thank you, Your Honor.

(Proceedings concluded.)

I CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPT FROM THE STENOGRAPHIC RECORD OF PROCEEDING IN THE FOREMATTER.

July 1, 1987

ROSA TREIBACH, CSR — DATE

L-1

FILED SEP 30 1987
ENTERED SEP 30 1987
CLERK, U.S. DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RICHARD L. MITCHELL, JR., Plaintiff, vs. THE BOARD OF TRUSTEES OF THE LOS ANGELES COMMUNITY COLLEGE DISTRICT, et al., Defendants.

CV-86-5105 WMB

JUDGMENT

The Court having made its Findings of Fact and Conclusions of Law now enters Judgment in favor of Defendants and against plaintiff as to all claims both federal and state. Defendants are entitled to costs in the amount of $_____

DATED: Sept. 29, 1987

WILLIAM MATTHEW BYRNE, JR.
UNITED STATES DISTRICT JUDGE

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d)

M-1

FILED MAR 3 1988
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD L. MITCHELL, JR., Plaintiff-Appellant, vs. LOS ANGELES COMMUNITY COLLEGE DISTRICT, Defendants-Appellees.	No.87-5966 DC# CV-86-5105 WMB Central California ORDER

Before: ALARCON, NORRIS and LEAVY, Circuit Judges

Appellant's petition for rehearing and rehearing en banc is denied.

MoCal 11/20/87

N-1

FILED OCT 13 1988
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD L. MITCHELL, JR.,	No.87-6553
Plaintiff-Appellant,	
vs.	No.87-6618
LOS ANGELES COMMUNITY COLLEGE DISTRICT; LESLIE KOLTAI; VIRGINIA F. MULROONEY; KENNETH S. WASHINGTON; CATHERINE CLOSE; WALTER C. MAC INTOSH; RODNEY A. PATTERSON,	D.C.# 86-5105 WMB
Defendants-Appellees.	ORDER

Before: KOELSCH, FARRIS and WIGGINS,

Circuit Judges

Appellant's petition for rehearing is denied.

O-1

SUPREME COURT OF THE UNITED STATES

No. A-451

RICHARD L. MITCHELL, JR.,

Petitioner

v.

Los Angeles Community College District

et al.

O R D E R

UPON CONSIDERATION OF THE APPLICATION OF COUNSEL FOR THE PETITIONER,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including February 10, 1989.

/s/ Sandra Day O'Connor
Associate Justice of the
Supreme Court of the
United States

Dated this 6th
day of December, 1988

SUPREME COURT OF THE UNITED STATES

OFFICE OF THE CLERK

WASHINGTON, D.C. 20543

JOSEPH F. SPANIOL, JR
Clerk of the Court

February 14, 1989

Mr. R.L. Mitchell
1282 Redondo Boulevard
Los Angeles, California 90019

RE: R.L. Mitchell v. Board of Trustees

Dear Mr. Mitchell:

The enclosed petition for writ of certiorari was received in this office on February 13, 1989, and is returned in that no signed motion for leave to proceed in forma pauperis is attached as well as an affidavit of indigency. See the enclosed sample.

Very truly yours,

Joseph F. Spaniol, Jr.
Clerk

By Sandra Elliott Spagnolo
Assistant

SUPREME COURT OF THE UNITED STATES

OFFICE OF THE CLERK

WASHINGTON, D.C. 20543

JOSEPH F. SPANIOL, JR.
Clerk of the Court

February 14, 1989

Mr. Richard L. Mitchell, Jr.
1282 Redondo Boulevard
Los Angeles, California 90019

Dear Mr. Mitchell:

Your petition for writ of certiorari, which was mailed February 10, 1989, was received today. Thirty-nine copies are being returned in three boxes. In order to docket the case, a Rule 28.2 affidavit of mailing must be submitted, and the case must be corrected to comply with Rule 33 of the Rules of the Supreme Court.

You were granted an extension of time to file your petition to and including February 10th. In order to preserve

the February 10, 1989 mailing date as the date of the docketing, a notarized affidavit must be submitted by a member of the Supreme Court bar, setting forth the details of mailing. This rule applies to pro se petitioners as well as to those who are represented by counsel.

Rule 33 sets forth the professional printing printing and the typing and photocopying requirements for cases submitted on the paid docket. Forty copies of the petition must be submitted with the dimensions of 6-1/8" by 9-1/4", and bound with white covers which are heavier than the inside pages. All material within the petition and appendix must be either professionally printed or typed with pica type and double spaced, (with the exception of footnotes and indented quotations). Please note that photoreductions are expressly

prohibited by that rule.

Please submit the corrected copies and the Rule 28.2 affidavit of mailing promptly. A notarized certificate of service must also be submitted, reflecting that three copies of the corrected petition were mailed to opposing counsel. See Rule 28. I have retained the one copy of the petition, your check in the amount of $200.00, and correspondence.

Very truly yours

Suzy McDIVITT
Assistant Clerk

cc: Warren S. Kinsler, Esq.
Thomas Scheerer, Esq.

SUPREME COURT OF THE UNITED STATES

OFFICE OF THE CLERK

WASHINGTON, D.C. 20543

JOSEPH F. SPANIOL, JR.
Clerk of the Court

March 6, 1989

Mr. Richard L. Mitchell, Jr.
1282 Redondo Blvd.
Los Angeles, CA 90019

Re: Richard L. Mitchell, Jr., v. Board of Trustees of the Los Angeles Community College District, et al., Application A-451

Dear Mr. Mitchell:

Your purpoted petition for rehearing in the above-entitled case was received March 6, 1989.

With respect to the Rule 28.2 affidavit, I do not find that Lopez Holmes Hill is a member of the Bar of this Court. Furthermore, the statement has not been notarized as required by Rule 28.2. In order to take advantage of the filing by mail rule, only one who

is a member of the Bar of this Court execute the statement and it must comply in all respects with Rule 28.2. What was submitted does not comply.

If you intend to pay the $200 docket fee, the petition and appendix must comply with Rule 33. It may be typewritten so long as the pleadings appear on paper which is 6 1/8 by 9 1/4 inches, is double spaced and the type is no smaller than pica. The sample petition that was forwarded to you was for use when one is seeking leave to proceed in forma pauperis.

If you obtain and present to this office an affidavit of mailing that complies in all respects with Rule 28.2 and if you present 40 copies of a petition which complies in all respects with Rule 33, then your petition will be placed on this Court's

docket. Your attention is directed to Rule 33.7. Your check in the amount of $200 is returned.

Very truly yours,

JOSEPH F. SPANIOL, JR., Clerk

By:

Francis J. Lorson
Chief Deputy Clerk

lg
cc: Warren S. Kinsler, Esq.
Thomas Scheerer, Esq.

OFFICE OF THE
GENERAL COUNSEL

WARREN S. KINSLER
~~Acting~~ General
Counsel

LOS ANGELES COMMUNITY
COLLEGES
617 West Seventh St.
Los Angeles, CA 90017
(213) 628-7788

September 14, 1988

Ms. Cathy A. Catterson, Clerk
United States Court of Appeals
Ninth Circuit
Post Office Box 547
San Francisco, California 94101

Re: Mitchell v. LACCD et al.,
Case Nos. 87-6553, 87-6618
Request for Publication

Dear Ms. Catterson:

Pursuant to United States Court of Appeals, Ninth Circuit Local Rule 36-4, the Los Angeles Community College District requests that the disposition by "memorandum" of the above-referenced appeal be modified and certified for publication.

The Court's decision in this case fits the criteria set forth in Local Rule 36-2 for disposition by opinion. A published opinion by the court would clarify the

status of the law with respect to the availability of Eleventh Amendment immunity to California's schools and community college districts. The Memorandum decision is a well-reasoned and scholarly analysis of the issue of whether community colleges in California are agencies of the State and thereby entitled to share in the State's immunity from suit under the Eleventh Amendment. This issue is litigated in virtually every civil rights suit filed against school and community college districts in California. This is amply demonstrated by the enclosed letters in support of publication.A/

A/ Letters of support from other attorneys throughout the State of California to the Ninth Circuit requesting publication of its August 17, 1988 Memorandum decision are shown in footnotes numbered on the following pages B through G.

The issue of Eleventh Amendment immunity for schools and community colleges in

B/

MUSICK, PEELER & GARRETT
A LAW PARTNERSHIP INCLUDING PROFESSIONAL CORP.
ONE WILSHIRE BOULEVARD
TELEPHONE (213) 629-7600

(213) 629-7633

September 12, 1988

Ms. Cathy Catterson
Clerk, United States
Court of Appeals
Ninth Circuit
P.O. Box 547
San Francisco, CA 94101-0547

Re: Richard L. Mitchell, Jr. v. Los Angeles Community College District, et al., Docket Nos. 87-6553; 87-6618

Dear Ms. Catterson:

Publication of the above referenced case is hereby requested under Ninth Circuit Rule 36-4. The Court's opinion contains an important discussion of the issue of Eleventh Amendment immunity for California community college districts. The issue of Eleventh Amendment immunity for community college districts is a legal issue of unique interest and substantial public importance. Thus, the Mitchell decision is appropriate for disposition by opinion pursuant to Ninth Circuit Rule 36-2 (d).

Moreover, while analogous cases involving the University of California and California state

California has been left unresolved in this Circuit since the Supreme Court's

B/ (Cont'd)

community college and universities compel the conclusion that state community college districts are entitled to Eleventh Amendment immunity. Thus, the Mitchell decision is also appropriate for publication under Ninth Circuit Rule 36-2(a) (clarifies a rule of law) and 36-2(b) (calls attention to a rule of law which appears to have been generall overlooked.

The decision of the panel in Mitchell is directly relevant to arguments raised by defendants/appellants in Coleen R. Roberts of the Desert, et al., Docket Nos. 85-6335, 85-6356, 856366.

For the foregoing reasons, the undersigned respectfully requests publication of the Court's decision in Mitchell.

Very truly yours,

Dana D. Howells
for MUSICK, PEELER & GARRETT

DDH:jy

decisions in Mount Healthy City School District Board of Education v. Doyle,

---

C/

SCHOOLS LEGAL SERVICE
5801 Sundale Avenue P.O. Box 11110
Bakersfield, California 93389
(805) 398-3830

September 7, 1988

Clerk
United States Court of Appeals
Ninth Circuit Judicial Circuit
P.O. Box 547
San Francisco, CA 94101

Re: Request for Publication of Memorandum Opinion; Mitchell v. LACCD, et al., Case Nos. 87-6553 and 87-6618

Dear Sir:

We ask publication of this Court's Memorandum opinion dated August 17, 1988. We make this request under your Rule 36-4.

Our office represents over 100 California school districts, including six community colleges. The subject Memorandum opinion at long last resolves a fundamental constitutional law question hanging over the heads of our clients, and we would like to see firm establishment of precedent by formal publication.

In 1986, your Court did not reach the question now resolved. In Stones v. LACCD (1986) 796 Fed. 2d 270, 272, the Court left hanging the question

(Footnote C, continued on the next page)

429 U.S. 274 (1977) and Monell v. New York City Department of Social Services, 436 U.S. 656 (1978). The issued was raised by specifically left unresolved

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C/ (Cont'd)

of whether community colleges are California political subdivisions and thus covered by Eleventh Amendment immunities. As such, your decision clarifies the holding in Monell v. N.Y. City Dept. of Soc. Services (1978) 436, 98 S.Ct. 2018. This Memorandum resolves and announces an important rule of law, an issue of substantial legal importance.

We have separately reviewed the August 29, 1988, letter to you on this subject from attorney Mary Dowell. We wish to associate ourselves with her remarks and join in the request for publication. Thank you.

Respectfully submitted,

PETER C. CARTON

PCC:dka
cc: Warren Kinsler
Mary L. Dowell

by this Court in a published opinion Stones v. LACCD, 796 F.2d 270, 272(1986) affirming Stones v. LACCD 572 F.Supp.

D/

FOOTHILL-DeANZA
COMMUNITY COLLEGE DISTRICT
September 6, 1988

Honorable Judges
United States Court of Appeals - Ninth Circuit
United States Court of Appeals Building
125 South Grand Avenue
Pasadena, California 91105

Re: Publication of Mitchell v. Los Angeles Community College District, Nos. 87-6553; 87-6618

Honorable Judges:

I urge you to consider modification of the court's opinion in Mitchell v. Los Angeles Community College District to permit publication. The memorandum opinion issued by the court provides guidance to both plaintiffs and defendants with regard to the extent of thr Eleventh Amendment immunity of California Community Colleges.

If published, the opinion in this case will provide valuable authority for those who represent California Community Colleges, as well as other state educational institutions. Your consideration of this matter is greatly appreciated.

Respectfully,

Sharon M. Keyworth - General Counsel

1072 (C.D. Cal. 1983). In Stones, the district court specifically based its

E/

SAN DIEGO CITY SCHOOLS
EDUCATION CENTER
4100 Normal Street, San Diego, California 92103

September 6, 1988

Ms. Cathy A. Catterson, Clerk
U.S. Court of Appeals, Ninth Circuit
P.O. Box 547
San Francisco, California 94101

Re: Request for Publication of Decision in Mitchell v. LACOD, et al., Cas Nos. 87-6553, 87-6618

Dear Ms. Catterson:

Pursuant to United States Court of Appeals, Ninth Circuit, Local Rule 36-4, the San Diego Unified School District requests that the opinion in the above-referenced matter be certified for publication.

This request for publication is made on the ground that the law with respect to the availability of Eleventh Amendment immunity to California state colleges and universities. In addition, the decision will be instructive in determining the availability of Eleventh Amendment immunity to California School Districts. Thank you for your attention to this matter.

Sincerely,

JOSE A. GONZALEZ, Assistant General Counsel

decision with respect to the District and its officials. On the availability

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F/ SCHOOL AND COLLEGE LEGAL SERVICES
SONOMA COUNTY OFFICE OF EDUCATION
410 Fiscal Drive
Santa Rosa, CA 95403
(707) 527-2429

August 30, 1988

Mr. Warren Kinsler, General Counsel
Los Angeles Community Colleges
617 West Seventh Street
Los Angeles, California 90017

Re: Richard L. Mitchell v. LACCD

Dear Mr. Kinsler:

This office represents 45 public school and college districts in California. In that capacity this office urges your office to seek publication of the Ninth Circuit Court of Appeals' decision in Mitchell v. LACCD.

The specific conclusion as to 11th amendment immunity arises in nearly all Section 1983 cases involving community colleges in California. In fact, I litigated this point for over one year in the Stewart v. Sonoma County Community College District case. Ultimately, the case was settled before the matter was resolved. Needless to say, the Mitchell decision would have saved both sides a lot of time and our respective clients some substantial fees. Pleas let me know if I may be of any further assistance.

Very truly yours, Robert J. Henry, General Cnl.

of Eleventh Amendment immunioy of California schools and community college districts from suit in Federal court.

G/

LAW OFFICES
LIEBERT, CASSIDY & FRIERSON
6033 West Century Boulevard
Suite 900
Los Angeles, California 90045

August 29, 1988

Clerk
Uniteo States Court of Appeals
Ninth Judicial Circuit
7th and Mission Streets
P.O. Box 547
San Francisco, California 94101

Re: Mitchell v. LACCD et al., Case Nos. 87-6553, 87-6618

Dear Sir:

This letter is submitted pursuant to Ninth Circuit Rule 36-4 to request publication of this Court's Memorandum in this matter filed August 17, 1988. This law firm represents many of California's community college districts, with particular emphasis on cases involving coostitutional issues. The Court's reasoning in this case is a nrioical statement of a new and important rule of law for community colleges and I urge the Memorandum publication as an Opinion. It amply meets the standards established by the court in Rule 36-2 for publication.

(Footnote G is continued on the next page)

Publication in this instant will a rule of law which is of substantial public importance. Local Rule 36-2(a) and

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G/ (Cont'd)

- The Memorandum establishes and clarifies an important rule of law. It is well-reasoned, scholarly analysis of the question whether community colleges in California are state agencies and share in the state's immunity from suit under the Eleventh Amendment to the United States Constitution. This is a question that was specifically left unanswered by this Court in a published opinion, Stones v. LACCD, 796 F.2d 270, 272 (1986). Since it was left unansoered, the court should publish this excellent response now.

Io is a legal issue of substantial public importance. Community college districts in California have looked for clarifination of this question since the Supreme Court's decision in Monell v. New York City Department of Social Services, 436 U.S. 656, 98 S.Ct. 2018 (1978). Unless this court publishes this helpful analysis of the issue of community college immunity under the Eleventh Amendment, colleges and their officers and employees oill continue to be uncertain about the extent of their risk of liability. I urge the court to publish the Memorandum as an Opinion of the court. If I can provide further information about these issues or their effect on California community colleges please do not hestitate to contact me.

Very truly yours, LIEBERT, CASSIDY & FRIERSON
By Mary L. Dowell

Publication in this instant will clarify a rule of law which is of substantial public importance. Local Rule 36-2(a) and (d). We urge the court to publish the Memorandum as an Opinion of the Court. If we can provide further information about the issues presented by this case, or their impact on California educational institutions, please do not hestitate to contact this office.

Respectfully submitted,

WARREN S. KINSLER

GENERAL COUNSEL

WSK:pb

Enc.

1282 Redondo Boulevard
Los Angeles, CA 90019

November 18, 1988

Clerk, United States Court
of Appeals
P.O. Box 547
San Francisco, CA 94102

Re: MITCHELL v. BOARD OF TRUSTEES L.A.C.C.D., et al., 87-6553; 87-6618

ATTN: The Honorable M. OLIVER KOELSCH, Senior Judge
The Honorable JEROME FARRIS and
The Honorable CHARLES E. WIGGINS
Circuit Judges

Gentlemen:

This is in response to Appellees' attorney Warren S. Kinsler's letter of November 15, 1988 and attorney Gerald M. Sato, of ALLRED, MARKO, GOLDBERG & RIBAKOLL, his correspondence dated Noved 10, 1988 to this Court.

In its Memorandum decision filed August 17, 1988, this Court affirmed the discourt's Findings of Fact and Conclusion

of Law granting Appellees summary Judgment, and denied Appellant's timely petition for a rehearing filed October 13, 1988. In this Court's Memorandum decision, this Court ruled:

> "This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3."

On September 14, 1988, attorney Kinsler addressed this Court through a similar letter, except in this letter, unlike his November 15, 1988 letter, it is addressed to "Dear Sir or Madam.' (See Exhibit A). In his September 14, 1988 letter, it was addressed to "Ms. Cathy A. Catterson..." It appears that Mr. Kinsler's November 15, 1988 letter, in his continued clandestine fashion, would like to impress upon attorney Sato that he doesn't know anyone in the Ninth Circuit. In his September

13, 1988 letter, he petitioned this Co-ourt, requested and forwarded to this Court six (6) additional letters of support requesting that this Court pub-lish its Memorandum opinion on ground that "Publication in this instance will clarify a rule of law which is of sub-stantial public importance."(See Kin-sler's September 13, 1988 letter, p. 2 ¶2). I forwarded my objection and op-position to Appellees' requests for publication on September 26, 1988 on grounds Mr. Kinsler's requests were filed for improper purposes and in bad faith. This Court correctly noted "California state colleges and univer-sities are 'dependent instrumentali-ties of the state'..The Trustees of California State Colleges are state agencies created by the Legislature." (Court's Memo, p. 7).

However, this Court in error ruled that "under California law, the district is a state entity that possesses eleventh amendment immunity from appellant's §§ 1981, 1983 and 1985 claims in damages and for injunctive relief." (Id). As the issue stands from this Court's publication of this case, California's 106 community colleges, their officials and other litigants seeking Eleventh Amendment relief, will in error rely on this case in support of the Eleventh Amendment issue. Since the Federal courts looks to the state courts for guidance regarding Eleventh Amendment immunity, the First National Bank v. State of California, 197 Cal.App.3d 627;___Cal.Rptr.___(Dec. 1987), is the leading case regarding Eleventh Amendment immunity and California community colleges, wherein it ruled,

among other things:

> "...the fact that a state agency is created by statute to discharge a duty constitutionally imposed on the state does not transmit the agency into 'the state', nor render the state liable for its acts under a general theory of respondeat superior. (Union Trust Co. v. State of California (1908) 154 Cal. 716, 728-729 [99 P. 183]; Gonzalez v. State of California, supra, at p. 590 [105 Cal.Rptr. 804].) The authority of an agency like a school district is measured by the authority statutorily conferred upon its governing board. An agency may not act on behalf of the state, nor may the state perform a task delegated to the agency, unless statutorily authorized to do so." (At 634)... "The statute is clearly not intended to protect against a district's default on a financing agreement." (At 637).

Perhaps Mr. Sato's statement that I failed to file a complete a record as would have been presented, had I been represented at these proceedings by counsel needs a brief review. I presented this Court with twelve specific counts of misconduct demonstrated by attorney

Kinsler; none of those charges or evidence presented were discussed. I presented this Court with evidence demonstrating where attorneys Thomas Scheerer nor Henry G. Ullerich (attorneys representing Appellee Catherine Close) failed to substitute for attorney Warren S. Kinsler when attorney Kinsler removed this action from the state court to the federal court and refused to represent Appellee Close after removing this case. But most importantly, I called to the attention of this Court where Judge Byrne, after ordering me to file a second amended complaint, (1) gave Mr. Kinsler instructions on the best way to attack my complaint and (2) subsequently granted Mr. Kinsler's motion in keeping with those instructions:

THE COURT: This complaint isn't much. I am going to allow him to file it, and it is best attacked by way of a motion to dismiss.

MR. KINSLER: I'll be bringing my motion by way of a summary judgment.

THE COURT: Okay.

MR. KINSLER: I'll just file it within the rule.

MR. MITCHELL: Your Honor, I'm sorry, I didn't understand.

THE COURT: You wouldn't at this point.

MR. KINSLER: Let me make a suggestion. If you are expecting a Motion to dismiss in 20 days, may I ask for an addition 10, your Honor?

THE COURT: I'll grant 30 days to answer or otherwise respond." (See Exhibit C).

So, with the above documents presented only as part of the reasons why a more "completed record" would have presented a different result, is highly questionable. In his November 15, 1988 letter as shown in Exhibit A, attorney Kinsler stated:

"...Mr. Sato has no standing to object to the Court's decision to order publication because he does not represent a party."

The six attorneys he requested letters of support, requesting publication of this Court's August 17, 1988 Memorandum decision, also did not represent a party. Mr. Sato represented three of Appellees' former employees, who happened to be white, sued the Appellees' on ground of age discrimination, and was granted an out -of-court settlement.

This evidence was presented, argued but denied as one of the material issues of material facts. (See Exhibit D).(Also see Appellant's Opening Brief, Appendix XXXVII).

For all the foregoing reasons, I respectfully request that this Court reverse its Order and Opinion of November 8, 1988 and its publication of the same.

Sincerely,

Richard L. Mitchell, Jr.

RLM:jf
Encls.

cc: Willie Brown, Esq.
Speaker of the California
State Assembly
State Capitol
Sacramento, CA 95814

Anthony Essez, President
NAACP
2907 West Vernon Avenue
Los Angeles, CA 90043

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Dr. Donald G. Phelps, Chancellor
Los Angeles Community College
District
617 West Seventh Street
Los Angeles, CA 90017

John Van De Kamp
Attorney General of the State
of California
3580 Wilshire Blvd., RM. 800
Los Angeles, CA 90010

INTER-OFFICE CORRESPONDENCE
Los Angeles Community Colleges 12-2-83

TO: Mr. William Spaeter, Vice Chancellor, Personnel Services

FROM: Deweylene D. Henry, Assistant Director, Office of Student Services

SUBJECT: INTERVIEW PANEL FOR DECEMBER 2, 1983, Senior Director Occupational and Technical Education

In that I am one of the candidates scheduled for an interview, I am very concerned that no candidate, with the exception of Linda Thor, can be fairly evaluated today.

The panel has been established with direct linkage to the person presently acting in the position, Linda Thor. The panel members that I am concerned with are listed below:

1. Lowell Erickson - Linda Thor's former boss from the Public Information Office of the Chancellor.

2. John McDowell - a) Current (November 6,7,8,9) news stories in Washington Post Newspaper regarding Programs in Linda's area. His program receives funding from Linda Thor's program.

3. Ted Scheer - a) Husband of a paid employee who recently was under Linda's supervision, also; Glenna Scheer, his wife, has joint/proposal for her shop submitted thru Linda Thor's office awaiting funding. I don't mind the "Shoe-In"; but between Dr. Mitchell and his obvious "connections", and Linda Thor's "guarantees" - this is just awful. I do plan to be interviewed, but I was advised by my attorney to inform you of my concerns, of the lack of credibility that the committee represents.

DDH:jgp

cc: K. Washington
B. Henry
D. Agosto
E. Palmer

RICHARD L. MITCHELL, JR.
1282 Redondo Boulevard
Los Angeles, California 90019
(213) 936-9215

Plaintiff in Propria Persona

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RICHARD L. MITCHELL, JR., Plaintiff, vs. THE BOARD OF TRUSTEES OF THE LOS ANGELES COMMUNITY COLLEGE DISTRICT, et al., Defendants.	CV-No. 86-5105 WMB DECLARATION OF DEWEYLENE D. HENRY IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS ALTERNATIVELY SUMMARY JUDGMENT

Date: March 9 1987

Time: 10:00 A.M.

I, DEWEYLENE D. HENRY, declare and state as follows:

1. I am a resident of the State of California, I reside in Los Angeles County. I make this affidavit in sup-

port of the Plaintiff's opposition to a motion by the Los Angeles Community Colleges for a Summary Judgment.

2. I make this affidavit upon personal knowledge and experience of the facts contained herein, and if called as a witness, I could and would testify completely and competently thereto.

3. I am an employee of the Defendants' District at Los Angeles City College. I have been an employee of the College District since 1977. I was employed from 1977 until June 30, 1986 in the District Educational Services Division as Assistant Director. On June 20, 1986, I was retaliated against and demoted from an administrative position to a teaching position.

4. The demotion to the teaaching position was in retaliation for my having filed a civil rights claim against the

District for the elimination of the District's practices of racial discrimination in their hiring and promotional job vacancies and opportunities.

5. I treated the demotion and job reassignment as a constructive discharge and I resigned my position with the District.

6. I received a letter of Findings from the Office of Civil Rights dated April 14, 1986 that clearly stated that the Los Angeles Community College discriminates in their employee promotional and hiring practices of minorities.

7. The District entered into a settlement agreement with me and the Office for Civil Rights n July 8, 1986. The settlement agreement provided that the defendant reinstate me to an administrative position and that my resignation be rescinded.

8. On October 3, 1986, I entered into a Compromise and Release of a Worker's Compensation claim that I had filed in January, 1983 against the District for stress, high blood pressure and ulcers brought upon me by the terrible discrimination employment practices of the District. The award was granted to me as a 19% permanent disability in the dollar amount of $21,500.00.

9. I filed a charge of employment discrimination based on age and race with EEOC on September 16, 1983, within three hundred (300) days of the commission of the unlawful employment practice. I received a notification of Right to Sue letter from the U.S. Dept. of Justice dated May 16, 1986.

10. The Federal suit was filed in the United States District Court, Central District of California on August

14, 1986. The case is presently in the court of Judge Manuel Real, CASE No. CV-86-5331.

11. My attorney and representatives of the District are currently neotiating an out of court settlementof the case under court Rule No. 68.

12. I was introduced to Dr. Richard Mitchell in September 19, 1983 by Dr. Walter McIntosh, President of Los Angeles Southwest College. Dr. McIntosh informed me that I was not the only Black being discriminated against. He informed me that for the position of Senior Director of High and Occupational Education, that I was not hired for, Dr. Mitchell was also denied the position.

13. I began correspondence with Dr. Mitchell and soon noted the similarity in our charges, experiences and willful violations of unlawful employment

practices in the discrimination of minorities that he was also undergoing in the District.

14. Dr. McIntosh provided Dr. Mitchell with my approval, my home phone number. After many conversations and reviewing many documents and files, I believe that Dr. Mitchell has been denied equal employment opportunities by the Los Angeles Community Colleges.

15. I believe that the District has engaged in, and is engaging in the unlawful practices with the purpose and effect of denying Dr. Mitchell equal employment opportunities for employment because of his Race, Age and Sex.

16. I believe that approximately 15 "acting" positions constituting almost all the positions filled by "acting" appointments, were filled by whites candidates in order to place Dr. Mitchell

and myself at a disadvantage in the competitive selection process at the time the job was no longer "acting" but permanent. The experience criteria for each position was the number one reason given by permanent selection interviewers when questioned on their selection of applicant preferences.

17. I provided Dr. Richard Mitchell with copies of letters in my files, documents and information that was in my custody which was relevant to his charge of discrimination vs. the District. I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 17, 1987 at Los Angeles, California

DEWEYLENE D. HENRY - February 17, 1987

INTER-OFFICE CORRESPONDENCE
Los Angeles Community College

TO: Dr. Leslie Koltai, Chancellor

FROM: Rodney L. Patterson, Director
Office of Affirmative Action
Programs and Services

SUBJECT: SUMMARY OF OFFICE ACTIVITIES

A. COMPLAINT ACTIVITY

1. Deweylen Henry (OCR): We have confirmed scheduled appointments for OCR's on-site investigation to occur September 11-13. A copy of the schedule is attached.

The substance of the preliminary information is as follows:

a. Prompt completion of an overdue performance evaluation for Mrs. Henry is recommended (as well as others in the Division);

b. The investigator(s) will request specific documentation to support Dr. Washington's statement that her "perfor-

mance has been less than satisfactory",
c. in addition to the merit increment issue, six (6) permanent administrative appointments of formerly acting incumbents are under OCR review as examples of alleged discriminatory hiring practices. The fact that 35% of the candidates interviewed were minority (yet none were appointed) may be an issue with OCR. The agency may argue "program specificity" as per the Grove City principle. Persons appointed as a results of these selection decisions include: Nancy Conrath, Dr. Novotney, Don Culton, Paul Stanberry, Hilda Tomberlin and Dr. Mulrooney. We should be prepared to advance districtwide data, or other "botton line" statistics, in order to rebut any inference of unlawful selection in this narrow set of decisions.
d. We are advised that the OCR Staff

Investigator will be accompanied by Mr. Jack Lee, Staff Attorney.

FILED
MAY 2 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1622

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

RICHARD L. MITCHELL, JR.,
Petitioner,
vs.
THE BOARD OF TRUSTEES OF THE LOS ANGELES COMMUNITY COLLEGE DISTRICT, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WARREN S. KINSLER, General Counsel*

LOS ANGELES COMMUNITY COLLEGE DISTRICT

617 West Seventh Street
Los Angeles, California 90017
(213) 891-2188

Attorney for Respondents

*Counsel of Record

Lawyers Brief Service / Legal Printers / (213) 383-4457 / (714) 720-1510

No. 88-1622

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

RICHARD L. MITCHELL, JR.,
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vs.
THE BOARD OF TRUSTEES OF THE LOS ANGELES COMMUNITY COLLEGE DISTRICT, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WARREN S. KINSLER, General Counsel*

LOS ANGELES COMMUNITY COLLEGE DISTRICT

617 West Seventh Street
Los Angeles, California 90017
(213) 891-2188

Attorney for Respondents

*Counsel of Record

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
A. Nature of the Case	1
B. Statement of Facts	2
ARGUMENT	7
A. California Community Colleges Share in the State's Immunity From Federal Liability	9
B. As a Matter of California Law, Community College Districts Are State Agencies	17
C. As a Matter of Fact, California Community Districts Are State Agencies	25
D. Plaintiff is Not Entitled To Injunctive Relief	33
E. The Individual Respondents Are Immune As Well	35
CONCLUSION	36

TABLE OF AUTHORITIES

CASES	PAGE(S)
Atascadero State Hospital v. Scanlon 473 U.S. 234, 241, 243, 105 S.Ct. 3142, 3147-3149 1985)	9,11
Board of Regents v. Tomanio 446 U.S. 478, 483-484 100 S.Ct. 1790, 1795 (1980)	13
Delta Special School District No. 5 , State Board of Education for the State of Arkansas 745 F.2d 533 (8th Cir., 1984).	15
Edelman v. Jordan 415 U.S. 651, 94 S.Ct. 1347 (1974)	10
First Interstate Bank v. State of California 197 Cal.App.3d 627, 243 Cal.Rptr. 8 (1987)	12
Foreman v. G.M. 473 F. Supp. 166 (E.D. Mich. 1979)	11
Goss v. San Jacinto Junior College 558 F.2d 96 (5th Cir., 1979) .	16
Great Northern Life Insurance Co. v. Reed 322 U.S. 47, 64 S.Ct. 873 (1944)	10

PAGE(S)

Green v. Mansour
474 U.S. 64, 73, 106 S.Ct. 423, 428 (1985) 11

Hander v. San Jacinto Junior College District
519 F.2d 273 (5th Cir., 1975). 16

Hall v. City of Taft
47 Cal.2d 177 (1956) 18,19,22 23,27

Hall v. Medical College of Ohio
742 F.2d 299 (8th Cir., 1984) .15

Hans v. Louslana
134 U.S. 1, 10 S.Ct. 504 (1890)..... 10

Hoohuli v. Ariyoshi
741 F.2d 1169 (9th Cir., 1984)..... 16

Hutchins v. Board of Trustees of Michigan State University
595 F.Supp. 862 (W.D. Mich., 1984 15,16

Jackson v. Havakawa
682 F.2d 1344, 1350 (9th Cir., 1982) 17

Jagnandan v. Giles
538 F.2d 1166, 1174 (5th Cir., 1976) 16

Lerner v. Los Angeles City Board of Education
59 Cal.2d 382, 29 Cal.Rptr. 657 (1963) 23

PAGE(S)

Maestas v. Board of Education
749 F.2d 591 (10th Cir., 1984) 15

Martinez v. Board of Education of Taos Municipal School District
748 F.2d 1393 (10th Cir., 1984) 14,25

Mitchell v. Los Angeles Community College District
861 F.2d 198, 199-200 (9th Cir., 1988) 3

Richard L. Mitchell v. Los Angeles County Superintendent of Schools
805 F.2d 844 (9th Cir., 1986) .2

Monell v. New York City Dept. of Social Services,
436 U.S. 658, 690, n.55, 98 S.Ct. 2018, 2035, n.55 (1978) 36

Mt. Healthy City School District v. Doyle
429 U.S. 274, 97 S.Ct. 568 (1977) 12,13, 15,18

Pennhurst State School and Hospital v. Halderman
465 U.S. 89, 100-101, 104 S.Ct. 900, 908, (1984) 33,34

Peters v. Lieuallen
693 F.2d 966, 970 (9th Cir., 1982) 11

PAGE(S)

Pugh v. Alabama
438 U.S. 781, 98 S.Ct. 3057
(1978) 33

Pyne v. Meese
172 Cal.App.3d 392, 403 (1985).12

Quern v. Jordan
440 U.S. 332, 343-345, 99 S.Ct.
1139, 1146-1147 (1979)..... 10,25

Roberts v. College of the Desert
861 F.2d 1163, 1170-1171,
(9th Cir., 1988) 9

Rutledge v. Arizona Board of
Regents
660 F.2d 1345 (9th Cir.,
1981) 16

San Francisco Unified School
District v. Johnson
3 Cal.3d 937, 951-952,
92 Cal.Rptr. 309 (1971) 23,24

Schlessinger v. Reservist
Committee to Stop the War
418 U.S. 208, 222, 94 S.Ct.
2925, 2933 (1974) 34

State of Montana v. Peretti
661 F. 2d 756 (9th Cir.,
1981)..... 16

Stones v. Los Angeles Community
College District
572 F.Supp. 1072 (C.D. Cal.
1983), affirmed 796 F.2d 270
(9th Cir., 1986) 8,9

PAGE(S)

Vaughn v. Regents of the University of California
504 F.Supp. 1349 (E.D. Calif. (1981) 25,26

STATUTES

	PAGE(S)
UNITED STATES CONSTITUTION	
Eleventh Amendment	7,8,9,10, 11,12,13, 14,17,24, 25,34,36
FEDERAL STATUTES	
28 U.S.C. Section 2201	7,11
28 U.S.C. Section 2202	7,11
42 U.S.C. Section 1981	7,11
42 U.S.C. Section 1983	7,10,11, 12,13
42 U.S.C. Section 1985	7,10,11
42 U.S.C. Section 1988	13
42 U.S.C. Section 2000(d)..	7,11
Code of Federal Regulations	
34 CFR Part 100.7(e)	7
Civil Rights Act of 1964....	7
Comprehensive Employment and Training Act	4
Job Training Partnership Act	3
Federal Rules of Evidence	
Rule 201	26
STATE STATUTES	
Education Code	
Section 72230	27
Sections 74200 *et seq.*	27
Sections 84500 *et seq.*	31
Sections 84900 *et seq.*	30

Government Code

Sections 8880 *et seq.* 29

22 California Administrative Code Section 98410 6

California Constitution

Article IV, Section 25, subd. 27, (repealed 6/3/80) 19,20
Article IV, Section 16 20

Article IX 22,27
Article IX, Section 1 20
Article IX, Section 5 20
Article IX, Section 6 21
Article IX, Section 14 21

Article XI, Section 1 21
Article XIIIA 29,30
Article XIIIB 28
Article XVI, Section 8 28,30

Statutes of 1981, Chapters 103 and 1178 31

Statutes of 1984, Chapter 1 ..32

STATEMENT OF THE CASE

A. Nature of the Case

Petitioner, Dr. Richard L. Mitchell, contends that he was the victim of race and age discrimination resulting from Respondents' failure to appoint him to several administrative positions in the Los Angeles Community College District. Dr. Mitchell also claims that he was denied due process by the Respondents in their handling of his internal discrimination complaint. Petitioner alleges that the District and its employees violated federal and state law by discriminating against him on the basis of race and age and by denying him due process of law.

Dr. Mitchell's inability to obtain a job with the Los Angeles Community College District results from his lack of competitive qualifications

and his failure to renew his job application when instructed to do so.

This lawsuit constitutes at least the third attempt by the Petitioner to label educational institutions in Los Angeles County as racist. As with his prior claims pursued in the trial court and the Ninth Circuit Court of Appeals, this one is made of whole cloth. Dr. Mitchell's claims are the result of a paranoid obsession with racism and a grandiose perception of his own qualifications. For example, see Richard L. Mitchell v. Los Angeles County Superintendent of Schools, 805 F.2d 844 (9th Cir., 1986).

B. Statement of Facts

In conjunction with the issuance of its judgment in this action, the trial court developed an excellent synthesis of the case, and the trial court's Findings

of Fact are set forth in Appendix B accompanying the Petition. (Hereinafter "App. B.") The court of appeals accurately summarized the facts in its opinion. Mitchell v. Los Angeles Community College District, 861 F.2d 198, 199-200 (9th Cir. 1988). Simply stated, the facts are these:

1. Dr. Mitchell claims discrimination in the District's failure to invite him for more job interviews. This cannot be so because the paper-screening which occurs prior to interviews is "color-blind."

2. Dr. Mitchell claims he would have been appointed to the position of Senior Director, Occupational and Technical Education, but for the District's blatant race and age discrimination. Dr. Mitchell proved himself unqualified at his interview.

The job description requires familiarity with the Job Training Partnership Act (JTPA). Plaintiff did not even know that JTPA had replaced the Comprehensive Employment and Training Act. (App. B, p.13.)

3. Dr. Mitchell claimed the District retaliated against him for having filed claims of discrimination when he was rejected for the position of Assistant Dean, Academic Affairs at Los Angeles Southwest College on June 11, 1984. The undisputed fact of the matter is that the decision-maker, Dr. McIntosh, did not know and had no reason to know about Petitioner's earlier claims of discrimination. (App. B, pp. 15-16.) There simply was no causal nexus between the protected activity and the adverse decision.

4. Dr. Mitchell claims that he was retaliated against for his earlier claims when he was denied the position of Assistant Dean, Occupational Education. Petitioner simply failed to comply with the District's reasonable requirement that an up-to-date application be kept on file in the Personal Operations Branch of the District. There was no adverse decision; Plaintiff's name was not in the assistant dean pool because of his failure to timely renew his application. (App. B, p. 16.)

5. Petitioner claims that he was denied due process after the District failed to timely respond to his internal discrimination complaint. Petitioner chooses to ignore the fact that at the same time his internal complaint was pending, the very same allegations were being investigated by the U.S. Department

of Education's Office for Civil Rights and that the District's Office of Affirmative Action Programs and Services was deeply involved in resolving that complaint. (App. B, pp. 17-20.) Petitioner may not impose an unnecessary duplication of effort on the District. California law recognizes that. 22 California Administrative Code section 98410.

Dr. Mitchell knew prior to filing this action that his claims were meritless, yet he pursued them anyway. This sort of conduct should be made the subject of sanctions, particularly where the plaintiff knows from past experience that his conduct results in a huge waste of time and effort by the courts and his intended victims.

ARGUMENT

THE NINTH CIRCUIT COURT OF APPEALS CORRECTLY CONCLUDED THAT THE DISTRICT, ITS BOARD OF TRUSTEES AND ITS EMPLOYEES SHARE IN THE STATE'S ELEVENTH AMENDMENT IMMUNITY AND ARE THUS NOT SUBJECT TO LIABILITY PURSUANT TO 28 U.S.C. SECTIONS 2201-2202 OR 42 U.S.C. SECTIONS 1981, 1983, 1985 OR 2000(d).

Dr. Mitchell bases this action in large part on 28 U.S.C. sections 2201-2202, 42 U.S.C. sections 1981, 1983, 1985 and "Code of Federal Regulations section 100.7(e)" (sic). (Appellees assumed Dr. Mitchell was referring to 34 C.F.R. Part 100.7(e).) These regulations were promulgated in order to implement Title VI of the Civil Rights Act of 1964, 42 U.S.C. section 2000(d).)

The Eleventh Amendment of the United States Constitution bars any finding of liability on the part of the District, its Board of Trustees or its employees, acting in their official capacity. California's community college districts are agencies of the state for the local administration of public higher education and have been recognized as such by California law since at least 1956. As a result, California community college districts share in the state's immunity under the Eleventh Amendment. See, for example, Stones v. Los Angeles Community College District, 572 F.Supp. 1072 (C.D. Cal., 1983), affirmed on

other grounds, 796 F.2d 270 (9th Cir., 1986).[1]

A. California Community Colleges Share In the State's Immunity From Federal Liability.

Under the Eleventh Amendment of the United States Constitution, California's community college districts are not subject to suit in federal court by private parties where, as here, there has been no waiver by the state of its sovereign immunity and no abrogation of that immunity by Congress. Atascadero State Hospital v. Scanlon, 473 U.S. 234, 241-243, 105 S.Ct. 3142, 3147-3149 (1985). This principle is firmly woven

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[1] Contrary to Petitioner's assertion, the Ninth Circuit in Roberts v. College of the Desert, 861 F.2d 1163 (9th Cir., 1988), decided, prior to publication of this case, that Roberts should be remanded to the trial court for further factual findings on the issue of Eleventh Amendment immunity. Roberts, supra, 861 F.2d at 1170-1171.

into the fabric of American jurisprudence. Hans v. Louisiana, 134 U.S. 1, 10 S.Ct. 504 (1890); Great Northern Life Insurance Co. v. Reed, 322 U.S. 47, 64 S.Ct. 873 (1944).

In Quern v. Jordan, 440 U.S. 332, 343-345, 99 S.Ct. 1139, 1146-1147, (1979), the Supreme Court held that states and their agencies are not persons amenable to suit under 42 U.S.C. section 1983 because of the immunity conferred upon them by the Eleventh Amendment. The state's immunity under the Eleventh Amendment from suits in federal court based on 42 U.S.C. section 1983 is well established. Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347 (1974). Liability pursuant to 42 U.S.C. section 1985 requires an underlying violation of section 1983, and where, as here, the defendants are not liable

under section 1983, they are likewise not liable under section 1985. Damage suits against state agencies premised upon 42 U.S.C. section 1981 are likewise barred by the Eleventh Amendment. Peters v. Lieualien, 693 F.2d 966, 970 (9th Cir., 1982). Liability pursuant to 42 U.S.C. section 2000(d) is likewise precluded by the Eleventh Amendment. Cf. Atascadero State Hospital v. Scanlon, supra, 473 U.S. as 241-243, 105 S.Ct. at 3147-3149 (1985). Similarly, 28 U.S.C. sections 2201-2202 do not authorize suits against states and therefore cannot be used to circumvent the Eleventh Amendment. Green v. Mansour, 474 U.S. 64, 73, 106 S.Ct. 423, 428 (1985); Foreman v. G.M., 473 F.Supp. 166 (E.D. Mich., 1979). Under California law, agencies of the state are not persons for purposes of 42

U.S.C. section 1983. Pyne v. Meese, 172 Cal.App.3d 392, 403 (1985). Even a state court would have to dismiss these claims as a matter of law.[2]

The issue, of course, is what constitutes a state agency? The Supreme Court grappled with the problem in its decision in Mt. Healthy City School District v. Doyle, 429 U.S. 274, 97 S.Ct. 568 (1977).

> "The issue here thus turns on whether the Mt. Healthy Board of Education is to be treated as an arm of the state partaking of the state's Eleventh Amendment immunity, or is instead to be treated as a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend. The answer depends at least in part upon the nature of the entity created by state law." 429 U.S. at 280, 97 S.Ct. at 572.

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[2] Plaintiff's reliance on First Interstate Bank v. State of California, 197 Cal.App.3d 627, 243 Cal. Rptr. 8 (1987) is misplaced. For purposes of Eleventh Amendment analysis, First Interstate is not inconsistent with the District's position in this litigation.

The Court reviewed Ohio law, and concluded that the Mt. Healthy City School District was more like a city or county than like an agency of the state. But the salient feature of the Court's analysis is the principle that to determine whether an entity participates in a state's Eleventh Amendment immunity, a federal court must look to state law. This is consistent with principles of federal jurisdiction. See, e.g., Board of Regents v. Tomanio, 446 U.S. 478, 483-84, 100 S.Ct. 1790, 1795 (1980) (noting that 42 U.S.C. section 1988 instructs federal courts to refer to state law to determine the extent of federal jurisdiction under section 1983 as a matter of federal law). Hence, as a matter of federal law under the Eleventh Amendment, Ohio law may require a finding that the Mt.

Healthy City School District is not an arm of the state, but California law may require a finding that school and community college districts are part of a state system of public education.

A number of circuits have been called upon to perform this application of state law, and the results have varied depending upon the provisions of the laws they were called upon to apply.

For example, the Tenth Circuit Court of Appeals concluded that New Mexico law compelled the conclusion that a local school board and its members were immune, under the Eleventh Amendment, from a suit over alleged infringement of First Amendment rights, because local boards were arms of a state system of education. Martinez v. Board of Education of Taos Municipal School District, 748 F.2d 1393 (10th

Cir., 1984). See also Maestas v. Board of Education, 749 F.2d 591 (10th Cir., 1984). In Delta Special School District No. 5 v. State Board of Education for the State of Arkansas, 745 F.2d 533 (8th Cir., 1984), the Eighth Circuit reaffirmed that school districts in Arkansas are political subdivisions of the state, emphasizing that the benefit of that status carries with it burdens as well. The Sixth Circuit concluded that the Medical College of Ohio is not an agency of the State of Ohio, Hall v. Medical College of Ohio, 742 F.2d 299 (8th Cir., 1984), although its analysis, derived from Mt. Healthy City School District v. Doyle, supra, compelled the conclusion that Michigan State University is an arm of the State of Michigan. Hutchins v. Board of Trustees of Michigan State University, 595

F.Supp. 862 (W.D. Mich., 1984). When the Fifth Circuit examined community college districts in Texas and concluded that they were not agencies of the state, Hander v. San Jacinto Junior College, 519 F.2d 273 (5th Cir., 1975); Goss v. San Jacinto Junior College, 558 F.2d 96 (5th Cir., 1979), it recognized that its conclusion was a function of "peculiar Texas statutory and decisional law." Jagnandan v. Giles, 538 F.2d 1166, 1174 (5th Cir., 1976).

The Ninth Circuit has been called upon to apply these principles on a number of different occasions, and has examined the laws of Arizona (Rutledge v. Arizona Board of Regents, 660 F.2d 1345 [9th Cir., 1981] Montana (State of Montana v. Peretti, 661 F.2d 756 [9th Cir., 1981]), Hawaii (Hoohuli v. Ariyoshi, 741 F.2d 1169 [9th Cir.,

1984)) and California (Jackson v. Hayakawa, 682 F.2d 1344 (9th Cir., 1982)) to conclude that institutions of public higher education are arms of the state and share in Eleventh Amendment immunity. The principles developed in those cases serve as a firm foundation for an examination of California law relating to community college districts, and compel the conclusion that a California community college district shares the state's immunity under the Eleventh Amendment.

B. As a Matter of California Law, Community College Districts Are State Agencies.

California courts have long held that as a matter of state law, California's school and community college districts are agencies of the state for the local operation of the

state school system. They are distinctly not municipalities. They are not independent local school districts as was the Mt. Healthy City School District. They are subject to the plenary authority of the state legislature, and not to any local regulatory effort.

The watershed statement of the nature of California's school and community college districts was Hall v. City of Taft, 47 Cal.2d 177 (1956). In Hall, the California Supreme Court synthesized a number of its previous statements about California's public institutions of education with the constitutional status of education in California.

The facts of Hall were simple. The Taft Union High School and Junior College District (i.e., community

college district) wished to construct a school building. Its plans and specifications had been approved, as required (and still required) by the State Department of Education and the State Division of Architecture. However, the City of Taft attempted to impose its building and zoning requirements on the construction. The California Supreme Court held that it could not do so.

> "The public schools of this state are a matter of statewide rather than local or municipal concern; their establishment, regulation and operation are covered by the Constitution and the state legislature is given comprehensive powers in relation thereto." Hall v. City of Taft, 47 Cal.2d at 179.

The Court was persuaded that the provisions of the California Constitution absolutely precluded any other conclusion. The Constitution provided, at Article IV, Section 25,

subd. 27, that the legislature could not pass local or special laws providing for the management of common schools; it still provides, at Article IV, Section 16, that a local or special statute is invalid in any case if a general statute can be made applicable. In nearly every instance of school or community college regulation, a general statute is applicable.

Article IX, Section 1, still provides that "[a] general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people the legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement." Article IX, Section 5 still provides that the legislature shall provide for a system

of common schools. Article IX, Section 6, provides in extensive detail for the staffing, salary, organization, finance, and appropriations of the state's school system. No school or college may be transferred from the public school system or placed under the jurisdiction of any authority other than one included within the public school system. Article IX, Section 14, declares again that the legislature shall have the power, by general law, to provide for the incorporation and organization of school and community college districts.

The detailed requirements of Article IX contrast sharply with the brief, general provisions of Article XI of the California Constitution relating to local government. Significantly, Article XI, Section 1, specifies that counties are "legal subdivisions" of the

state; no parallel provision appears in Article IX relating to school or community college districts. The California Constitution consigns true municipalities to their electorates but assures that school and community college districts will be subject to close legislative scrutiny.

It is true that school and community college districts are locally organized. They are so organized pursuant to state law. As noted in Hall v. City Taft, supra.

> School districts are agencies of the state for the local operation of the state school system. (Citations omitted). The beneficial ownership of property of the public schools is in the state (citations omitted) ... [t]he beneficial owner of the fee [of public school property] is the state itself, and ... its agencies and mandatories - the various public and municipal corporations in whom the title rests - are essentially nothing but trustees of the state, holding the

> property and devoting it to the uses which the state itself directs." Hall v. City of Taft, 47 Cal.2d at 181-182. (Emphasis added.)

Since the supreme court's decision in Hall v. City of Taft, its holdings that school and community college districts are state agencies, and that the legislature has plenary authority over education in California, have been recurring themes in the decisions of California courts. The decision has controlled many issues, and has never been seriously questioned.

The California Supreme Court has shown no sign of doubting its own analysis. In Lerner v. Los Angeles City Board of Education, 59 Cal.2d 382, 29 Cal.Rptr. 657 (1963), the court noted that the board of education served as an agency of the state. In San Francisco Unified School District v. Johnson, 3

Cal.3d 937, 951-952, 92 Cal.Rptr. 309 (1971), the Court stated that:

> "Education, including the assignment of pupils to schools, is plainly a state function (citation omitted). 'The education of the children of the state is an obligation which the state took over to itself by the adoption of the constitution' (citation omitted). To carry out this responsibility the state has created local school agents of the state."

The foregoing analysis compels the conclusion that California's community college districts are agencies of the state for the local administration of public higher education, and thus share in the state's immunity from suits in federal court under the Eleventh Amendment. However, there is ample factual basis for this conclusion as well.

C. As A Matter Of Fact, California Community College Districts Are State Agencies.

From the analysis above, it is clear that federal courts look to a number of factors to conclude that a public entity is entitled to claim the shield of the Eleventh Amendment. Martinez v. Board of Educationof Taos Municipal School District, 748 F.2d 1393 (9th Cir., 1984), Vaughn v. Regents of the University of California, 504 F.Supp. 1349 [(E.D. Calif., (1981)]. Perhaps the single most compelling factor is the determination that any judgment obtained will be satisfied by state or state-controlled funds. Quern v. Jordan, 440 U.S. 332, 99 S.Ct. 1139 (1979). Courts have also looked to the extent to which the state retains a measure of control over the governing

body of the public entity, and the importance of the function involved. Vaughn v. Regents of the University of California supra, at 1351-1354 (1981).

An examination of the role of California's community colleges in the scheme of higher education in California, all by reference to information of which the federal courts may take proper judicial notice pursuant to Federal Rules of Evidence, Rule 201, demonstrates that the colleges are state agencies. The court of appeals so found, and this Court should hesitate long before disturbing these factual findings. (App. B, pp. 24-26.)

First, the state has retained significant control over the governing bodies of California community college districts, and the functions they perform. As noted, all district

property is considered to be held in trust for the benefit of the state. Hall v. City of Taft, supra. The members of the governing boards are aptly denominated "trustees," California Education Code section 72230. No governing board comes into existence without state approval, see Education Code sections 74200 et seq..

Second, community college districts, like the University of California, are engaged in the performance of "the essential governmental function" of providing higher education to the citizens of the State of California. The state has a particular interest in the education of its population and has made it an essential function of state government. The California Constitution, Article IX, provides for a system of public

education, including community college districts. Higher education is a function in which the state has taken a tender interest.

Third, and most important, any judgment awarded in this case against the district would be satisfied ultimately out of state funds. The California Constitution recognizes that California's school and community college districts are dependent ultimately on the state treasury for their funds. Support of the public schools and public institutions of higher education is made the first charge on the state's revenues, Article XVI, Section 8 of the California Constitution. In November of 1988 voters in the State of California adopted "Proposition 98" which amended Articles XIIIB and XVI of the California

Constitution to assure specific levels of state funding for schools and community college districts and to transfer to such districts state revenues in excess of the state's appropriation limit.

The function of the state lottery, also enacted by the voters by initiative measure at Government Code sections 8880 et seq. is the support of education, see Government Code section 8880.1.

The state's control over revenues has always been an integral element of community college finance. Although local property taxes were used to supply the funds to support community colleges, the state retained authority over the amount of tax to be collected. The enactment of Article XIIIA into the Constitution through approval by the

voters of Proposition 13 in 1978 reinforced this high degree of state involvement in the funding of California community colleges. Pursuant to Article XIIIA, property taxes are limited to 1% of full cash value, and only the legislature has the authority to increase taxes. The local taxing authority was virtually eliminated.

Since the enactment of Article XIIIA, the state legislature has adopted a series of finance measures designed to fulfill its obligation under Article XVI, Section 8. The first was the Community College Emergency Finance Act of 1978 (Education Code sections 84900 et seq.), which simply supplanted the substantial loss of local revenues in fiscal year 1978-79 with funds from the state general fund. The Emergency Finance Act has been amended each budget

year to refine and clarify the mechanisms whereby the legislature appropriates funds to community college districts.

The funding formulas created by the state budget in 1981, and by Chapters 103 and 1178, Statutes of 1981, require that all locally raised revenue be appropriated by the state into the total budget available for allocation to any community college district. The state determines what each community college district should be allocated based on formulas which derive from average daily attendance in each district. (Education Code sections 84500 et seq.) Each college district is entitled to receive its allocation of local and state revenue in accordance with the formula. The formulas are calculated to effect a legislative

policy of equalization of funding on a statewide basis.

Pursuant to Chapter 1, Statutes of 1984, all community college districts are now required to levy an enrollment fee on their students. This enrollment fee is appropriated by the state into the allocation formula described above, and does not accrue to the benefit of the local district, but to the benefit of the state. The state determines the amount of the fee, and there is no local discretion over it.

Clearly, if the Respondent District were required to pay a judgment to Petitioner, it would do so with funds which it has pursuant to the state's authorization. Any judgment in this matter would be satisfied with state controlled funds, and would impact state revenues.

The trial court and court of appeals correctly found that as a matter of fact California community college districts are agencies of the state, and that Petitioner presented absolutely no evidence to rebut those facts.

D. Plaintiff Is Not Entitled To Injunctive Relief.

In this case the court of appeals also concluded that if claims for monetary relief are barred, then as to the state and its agencies, i.e., the District, injunctive relief is unavailable as well. Pugh v. Alabama, 438 U.S. 781, 98 S.Ct. 3057 (1978). See also Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 100-101, 104 S.Ct. 900, 908 (1984). (Jurisdictional bar applies regardless of the nature of the relief sought.)

This action seeks to compel Respondent to employ Petitioner as a permanent certificated administrator. This is precisely the intrusion on state sovereignty which the Eleventh Amendment was designed to avoid. Pennhurst State School and Hospital v. Halderman, supra, 465 U.S. at 106, 104 S.Ct. at 911 (1984). Injunctive relief compelling Petitioner's employment conflicts directly with the principles of federalism that underlie the Eleventh Amendment. This Court must reject Petitioner's invitation to engage in "government by injunction." Schlessinger v. Reservist Committee to Stop the War, 418 U.S. 208, 222, 94 S.Ct. 2925, 2933 (1974).

E. The Individual Respondents Are Immune As Well.

Although the caption of the Second Amended Complaint in this action appears to name Dr. Koltai, Dr. Mulrooney, Dr. Washington, Dr. McIntosh, Mr. Spaeter, Ms. Palmer and Mr. Patterson in their individual, as well as official capacities, the Complaint implicitly makes the judicial admission that all of the acts alleged were made by the Defendants within the scope of their employment. The trial court found that no acts were alleged either in the Second Amended Complaint or in Dr. Mitchell's Declaration, other than those occurring as a result of the Defendants acting in their official capacity. (App. B, p. 26.)

It is well settled that if the claims for monetary relief against the

state agency are barred by the Eleventh Amendment, then those same claims against the individual representatives of the agency, acting in their official capacity, are likewise barred. Monell v. New York City Dept. of Social Services, 436 U.S. 658, 690, n.55, 98 S.Ct. 2018, 2035, n.55 (1978). This is because actions against the officer are in essence actions against the governmental entity of which the officer is but an agent. Any monetary award would be paid with state money. To the extent the Court believes that the Defendants have committed any acts in their individual capacity, they are entitled to qualified good faith immunity from liability.

CONCLUSION

Dr. Mitchell's claims are barred as a matter of law by the Eleventh

Amendment. The Ninth Circuit Court of Appeals properly interpreted California law. Certiorari must be denied or, alternatively, the Ninth Circuit's opinion should be summarily affirmed.

Dr. Mitchell's conduct in this Court and in the courts below must be made the subject of sanctions in the form of an award of attorney's fees to the Respondents.

Dated: 4/28/89 Respectfully submitted,

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